

77-214

No.

Supreme Court, U. S.

FILED

AUG 8 1977

MICHAEL RODAK, JR., CLERK

In the

# Supreme Court of the United States

OCTOBER TERM, 1977

C. CLYDE ATKINS, et al.,

*Plaintiffs,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ARTHUR J. GOLDBERG  
1101 17th Street N.W.  
Suite 1100  
Washington, D.C. 20036

### Of Counsel

STEPHEN G. BREYER  
1545 Massachusetts Avenue  
Cambridge, Massachusetts

KEVIN M. FORDE  
RICHARD J. PRENDERGAST  
111 W. Washington Street  
Chicago, Illinois

## SUBJECT INDEX

	PAGE
Citations to Opinion Below .....	2
Jurisdiction .....	2
Questions Presented .....	2
Constitutional and Statutory Provisions .....	2
Statement .....	3
Reasons for Granting the Writ .....	7
Conclusion .....	32
 Appendix A:	
Constitutional Provisions .....	1a
Statutory Provisions .....	2a
 Appendix B:	
List of Petitioners .....	5a
 Appendix C:	
Farrand, The Records of the Federal Convention of 1787 .....	9a
 Appendix D:	
Opinion of the United States Court of Claims ....	13a

## TABLE OF AUTHORITIES

### CASES

Ashwander v. TVA, 297 U.S. 288 (1936). ....	17
Baker v. Carr, 369 U.S. 186 (1962). ....	22
Bank of Hamilton v. Dudley, 2 Pet. 492 (U.S. 1829). ....	18
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). ....	22
Buckley v. Valeo, 424 U.S. 1 (1976). ....	8, 10, 11, 18

	PAGE
Champlin Refining Co. v. Corporation Com'n, 286 U.S. 210 (1932). ....	17, 20
Chadha v. Immigration and Naturalization Service, Ninth Circuit. ....	12, 14
Clark v. Valeo, No. 76-1105 (October term 1976). ....	6, 8, 10, 11
Commonwealth v. Mann, 5 Watts & Serg. 403 (Pa. 1893). ....	29
Dean Milk v. City of Madison, 340 U.S. 349 (1951). ....	28
Electric Bond and Share Co. v. SEC, 303 U.S. 419 (1938). ....	18
Evans v. Gore, 253 U.S. 245 (1920). ....	22, 24, 25, 26, 28
Jacobs v. United States, 290 U.S. 13 (1933). ....	21
McCorkle v. United States, Fourth Circuit. ....	12
Miles v. Graham, 268 U.S. 501 (1925). ....	24
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). ....	18
O'Donoghue v. United States, 289 U.S. 516 (1933). ....	24
O'Malley v. Woodrough, 307 U.S. 277 (1939). ....	24, 26, 28, 29
Peck & Co. v. Lowe, 247 U.S. 165 (1918). ....	26
Powell v. McCormack, 395 U.S. 486 (1969). ....	22
Remonstrance of the Judges, 4 Call (Va.) 135 (1788). ....	23, 25
Reynolds v. Sims, 377 U.S. 533 (1964). ....	26
South Carolina Hwy. Dept. v. Barnwell Brothers, Inc., 303 U.S. 177 (1938). ....	28
Tilton v. Richardson, 403 U.S. 672 (1970). ....	18
United States v. Jackson, 390 U.S. 570 (1968). ....	18

	PAGE
United States Glue Co. v. Oak Creek, 247 U.S. 321 (1918). ....	26
Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938). ....	26
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). ....	15
CONSTITUTIONAL PROVISIONS	
Article I, §7 .....	2, 8, 13, 15
Article I, §9 .....	26
Article II, §1 .....	2, 8, 15
Article III, §1 .....	2, 4, 5, 6, 21, 23, 24, 25, 30
STATUTES	
2 U.S.C. §§351 <i>et seq.</i> .....	3, 7
2 U.S.C. §359 (1) (B) .....	2, 3, 4, 7, 8, 15, 19
5 U.S.C. §§5301 <i>et seq.</i> .....	31
5 U.S.C. §5332 .....	4, 31
28 U.S.C. §1255 (1) .....	2
28 U.S.C. §1491 .....	21
Pub. L. 90-206 .....	19
Pub. L. 95-19 §401 .....	15
OTHER MATERIALS	
S. Rep. 1335, 54th Cong., 2nd Sess. 8 (1897) .....	8
76 Cong. Rec. 3539 (1933) (Senator Byrnes) .....	10
83 Cong. Rec. 3090 (1939) (Senator King) .....	10
84 Cong. Rec. 2477-78 (1939) (Representatives Taber and Wolcott) .....	10

87 <i>Cong. Rec.</i> 1100, 1245, 1269, 1569, 2063-7 (1941) (Senators Clark, Gillette, McCarran, and Murdock)	10
87 <i>Cong. Rec.</i> 6504-07 (1941) (Senators Adams and Taft)	10
97 <i>Cong. Rec.</i> 5443 (1951) (Representative Patman)	10
100 <i>Cong. Rec.</i> 5095 (1954) (Senator Dirksen)	10
111 <i>Cong. Rec.</i> 12639-40 (1965)	21
113 <i>Cong. Rec.</i> 8493, 27288, 28406, 28409, 28411, 28612, 28641-4, 28622, 28870, 33590, 33972, 34013, 34014, 34022-3, 34212-5, 34220-2, 34236, 34241, 34255, 34261, 34410, 35524, 35811, 35822, 35839-41, 36088, 36100-8	18, 19, 20
122 <i>Cong. Rec.</i> E. 3901-3902 (1976)	29
122 <i>Cong. Rec.</i> S. 14989 (1976)	29
122 <i>Cong. Rec.</i> H. 3367 (1976)	30
Bolton, <i>The Legislative Veto: Unseparating The Powers</i> , (American Enterprise Institute 1977)	9
Dixon, "The Executive On A Leash: The 'Congressional Veto' and Separation of Powers", ..... L.J. (197..)	9
Ginnane, "The Control of Federal Administration by Congressional Resolutions and Committees", 66 <i>Harv. L. Rev.</i> 569 (1953)	9, 13
Jackson, "A Presidential Legal Opinion", 66 <i>Harv. L. Rev.</i> 1353 (1953)	20
Miller & Knapp, "The Congressional Veto: Preserving the Constitutional Framework", 52 <i>Ind. L. J.</i> 367 (1977)	9
Sprecher, "The Threat to Judicial Independence", 51 <i>Ind. L. J.</i> 380 (1976)	23

Stern, "Separability and Separability Clauses in the Supreme Court", 51 <i>Harv. L. Rev.</i> 76 (1937)	18
Stewart, "Constitutionality of the Legislative Veto", 13 <i>Harv. J. Legislation</i> 593 (1976)	9
U.S. Library of Congress, "Interim Report on the Exercise of Congressional Review, Deferral and Disapproval Authority Over Proposed Executive Actions, 1960-75".	10
Watson, "Congress Steps Out: A Look At Congressional Control of the Executive", 63 <i>Calif. L. Rev.</i> 983 (1975)	9, 10, 13
O. Ritter & W. Silber, <i>Money</i> (1970)	23
..... Ops. A. .... (Jan. 31, 1977)	9

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

—  
*No.*

=====  
C. CLYDE ATKINS, et al.,

*Plaintiffs,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant.*  
=====

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF CLAIMS  
—

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered on May 18, 1977, in the above entitled consolidated cases.

### CITATIONS TO OPINION BELOW

The Judgment of the Court of Claims is not reported but is attached as Appendix D to this petition.

### JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

### QUESTIONS PRESENTED

1. Whether Congress can constitutionally provide that the exercise of authority to set judicial salaries, lawfully delegated to the President, shall be subject to veto by one house of Congress.

2. Whether Article III, Section 1, of the Constitution, providing that judges shall receive a "Compensation, which shall not be diminished. . .", prevents Congress from discriminating against judges, during a time of serious inflation, by failing to maintain the real value of judges' compensation, given that (1) the real value of the compensation of almost all other American workers has been maintained, (2) Congress has taken steps to maintain the real value of the compensation of almost all other government employees, and (3) one House of Congress has acted to veto salary adjustments that would otherwise have helped to maintain real judicial compensation.

### CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions involved are Article I, Section 1; Article I, Section 7; Article II, Section 1; and Article III, Section 1. The statutory provision involved is 2 U.S.C. §359(1)(B). These provisions are printed in Appendix A to this Brief (App. 1a-4a).

### STATEMENT

Petitioners in these three consolidated cases are 130 federal circuit and district judges<sup>1</sup> who have sued the United States for compensation due them for services since March 15, 1969. On that date the salary of a district judge was fixed by law, under the Federal Salary Act of 1967, 2 U.S.C. §§351 *et seq.*, at \$40,000. The salary of a circuit judge was fixed at \$42,500. Between 1969 and early 1976, when this suit was filed, consumer prices, as measured by the consumer price index, rose more than 52%. The following events also occurred:

1. In 1973, (pursuant to the system established under the Federal Salary Act of 1967, 2 U.S.C. §§351 *et seq.*)<sup>2</sup> a special salary commission recommended that federal judges' salaries be increased by about 25% and specifically found that amount necessary to offset "the five year cost-of-living advance". Subsequently, the President submitted to Congress a judicial salary increase of 7.5% per year for each of the fiscal years 1974, 1975, and 1976. The Senate passed a resolution disapproving this adjustment. The House did not vote on the issue. Under the terms of 2 U.S.C. §359(1)(B), the increase was thus "vetoed" by one house of Congress and did not take effect.

2. Congress annually raised the salaries of all federal employees but judges, congressmen, and a few high level Executive Branch officials (less than one half of one per-

<sup>1</sup> Petitioners are listed in Appendix B (App. 5a-8a).

<sup>2</sup> The 1967 Act provides for a Commission on Executive, Legislative and Judicial Salaries which reviews existing salary levels every four years and makes recommendations to the President. The President then submits to Congress adjustments that take effect automatically unless disapproved by one or both houses of Congress.

cent of all federal employees). The average federal employee's salary increased by 36.5%; that of starting government lawyers by 59.32%; and that of those in the Armed Forces by more than 100%. Both the size and the salaries of Congressional staffs also increased substantially.

3. The salaries of almost all workers in the private sector, including lawyers and other professionals, roughly kept pace with inflation.

4. On August 9, 1975, the Executive Salary Cost of Living Adjustment Act<sup>3</sup> was passed, limiting judges to a 5% salary increase as of October 1, 1975.

Thus between 1969 and 1976, while the real value of almost all other workers' salaries stayed constant, that of judges did not. The \$40,000 salary of a district judge dropped in real value to \$26,249 by October 1, 1975, when it rose slightly to \$27,561 due to the 5% adjustment. The \$42,000 salary of a circuit judge dropped in real value to \$27,889 by October 1, 1975, when it rose slightly to \$29,267.

In early 1976 plaintiffs filed three separate suits, now consolidated into this single action. Plaintiffs claimed that 2 U.S.C. §359(1)(B), providing for a one-house veto of salary adjustments proposed by the President, was unconstitutional and severable from the remainder of the Postal Revenue and Federal Salary Act of 1967. The salary adjustments proposed by the President in 1974 (for fiscal years of 1974, 1975, and 1976) therefore took effect pursuant to the provisions of that Act; plaintiffs are entitled to the difference between the adjusted salaries and the salaries actually received. Plaintiffs also

<sup>3</sup> 5 U.S.C. §5332.

claimed their compensation had been unconstitutionally diminished in violation of Article III, Section 1, of the Constitution, due to defendant's failure to upwardly adjust by even one cent their salary levels between 1969 and 1975, while, during the same period of time, annual cost-of-living increases were granted to almost all other federal employees. (As discussed in greater detail, *infra*, it is not, nor has it ever been, plaintiff's intention that their salary levels must be adjusted on a dollar basis, in order to off-set the corresponding negative defects of inflation. See pp. 24-25, and n. 41, *infra*).

On May 18, 1977, the Court of Claims granted defendant's motions to dismiss.<sup>4</sup> By a vote of 4-3, the Court held that the "one-house veto" was constitutional. It also held that, because Congress had not deliberately discriminated against judges, and because a "mass exodus of officeholders from the federal bench" had not yet occurred, plaintiffs' compensation had not been unconstitutionally diminished.

Plaintiffs and the Court of Claims were aware that in February 1977 Congress passed legislation authorizing a future increase (as of March 1977) in plaintiffs' nominal dollar salaries. This action did not moot plaintiffs' claim. If the Congressional veto is unconstitutional, (or, if Article III prohibits significant diminishment of real judicial compensation), plaintiffs are entitled, at a mini-

<sup>4</sup> Previously, the Court of Claims had certified to the Supreme Court the question of whether its judges were disqualified from hearing this case. The Solicitor General and plaintiffs filed briefs in this Court, arguing that the judges were not disqualified and that the "rule of necessity" permitted and perhaps required the court to hear the case. On June 21, 1976, this Court dismissed the certified question. The Court of Claims subsequently determined that it was qualified to hear and to decide these issues.

mum, to the Presidential adjustment amounting to a continuous 7.5% annual increment (for each of the fiscal years 1974, 1975, and 1976), or approximately \$20,000 per plaintiff, which would have accrued to them as a result of the salary levels set by the President.<sup>5</sup> The February 1977 increase, looking only to the future, in no way affects this legal obligation. Moreover, plaintiffs seek certiorari in this case — despite the passage of legislation that increases their future salaries — because the two major legal issues which the case presents are of continuing and vital importance to the proper functioning of, and relationship among, the three major branches of the federal government.

This petition will first discuss the question of the constitutionality of the one-house veto, which divided the Court of Claims 4-3. This issue is, in the words of the Solicitor General, “unquestionably significant . . . important and recurring,”—an issue which ought to be decided in an *appropriate* case. (In this reference, the Solicitor General cited our case.) Brief of the Solicitor General, *Clark v. Kimmitt*, No. 76-1105 (October term 1976).<sup>6</sup> This petition will then discuss the Compensation Clause of Article III, Section 1, an issue which is also of ongoing significance in the context of judicial independence.

---

<sup>5</sup> While the \$20,000 is important to each federal judge, the basic principle which has stimulated this suit is the threat to judicial independence inherent in Congressional assertion of the power to cut the real value of judicial compensation. (See pp. 21-31, *infra*.)

<sup>6</sup> Plaintiffs understand the Government's position on this question to be that a one-house veto is unconstitutional in the context of the present case, while contending it to be constitutional in the context of government reorganization. See, note 11, *infra*.

## REASONS FOR GRANTING THE WRIT

### I. THIS CASE PRESENTS IN A CLEAR, FOCUSED MANNER THE QUESTION OF THE CONSTITUTIONALITY OF THE ONE-HOUSE VETO—A QUESTION OF GREAT INSTITUTIONAL AND PRACTICAL IMPORTANCE, WHICH REQUIRES AUTHORITATIVE JUDICIAL DETERMINATION.

Under the Federal Salary Act of 1967, 2 U.S.C. §§351 *et seq.*, Congress provided that a Presidential decision to increase judicial salaries<sup>7</sup> would automatically take effect as law, but, in the words of §359,

only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—

(A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations,

(B) neither House of the Congress has enacted *legislation* which specifically disapproves all or part of such recommendations, or

(C) both. [emphasis added]<sup>8</sup>

In early 1974, acting pursuant to this law, the President adjusted judicial salaries, by authorizing a 7.5% increase to take effect each year for the fiscal years 1974, 1975 and 1976. On March 16, 1974, the Senate, acting pursuant to clause (B) of §359, disapproved the President's au-

---

<sup>7</sup> The decision would take place only after the President received the advice and recommendation of a special Salary Commission.

<sup>8</sup> Congress, in the use of the word *legislation*, though inappropriate for one-house action, recognized that it interpreted the power it sought to exercise as “legislative”.

thorization. Plaintiffs contend that §359 (B) — providing for a one-house veto — is unconstitutional and severable from the remainder of the 1967 Act. Therefore, the salary adjustments took effect.

A. Article I, Section 1, of the Constitution vests all legislative powers “in a Congress” which shall consist of *both* “a Senate and House of Representatives.” The principle implicit in this provision — that “every exercise of ‘legislative powers’ [must] involve . . . the concurrence of the two Houses,” S. Rep. 1335, 54th Cong., 2nd Sess. 8 (1897) and thus must, under Article I, Section 7,<sup>9</sup> be presented to the President for his signature or veto, was followed consistently until 1932. Since then, Congress has enacted from time to time legislation that purports to allow one (or both) houses of Congress (or committees of one House) to repeal or to modify authority previously delegated by law to the President, by passing a resolution “vetoing” a lawful exercise of that authority.

The constitutional validity of the legislative veto has never been upheld.<sup>10</sup> To the contrary, Presidents have not only vetoed such measures, but, since Herbert Hoover,

---

<sup>9</sup> Article I, Section 7, Clause 3, provides that “Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives shall be necessary” must be presented to the President for his signature or veto.

<sup>10</sup> Although *Buckley v. Valeo*, 424 U.S. 1 (1976), did not reach the question, Justice White mentioned it in a concurring opinion and suggested that the legislative veto may be constitutional. In *Clark v. Valeo*, . . . F. 2d . . . (D.C. Cir. 1977), in which a majority held the issue not justiciable, Judge McKinnon, authoring a separate opinion, considered the question in detail and expressed the firm opinion that the one-house veto was unconstitutional.

every President, supported by the opinion of his Attorney General, has argued that such provisions violate the Constitution.<sup>11</sup> The opinion of the Department of Justice,<sup>12</sup> that of scholars in the field<sup>13</sup> and that of many Senators

---

<sup>11</sup> See, Watson, “Congress Steps Out: A Look at Congressional Control of the Executive,” 63 *Calif. L. Rev.* 983 (1975).

The present Administration apparently believes that the one-house veto is unconstitutional in many contexts, but constitutional in the context of Executive Branch reorganization. See opinion of the Attorney General on the constitutionality of the one-house veto provision of the Executive Reorganization statute (Jan. 31, 1977).

<sup>12</sup> The Administration of President Ford conceded the unconstitutionality of the one-house veto in this case which was specifically recognized by the Court of Claims at p. 49 of its opinion. See also, Testimony of Assistant Attorney General Antonin Scalia, Office of Legal Counsel, Department of Justice, before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, May 15, 1975.

<sup>13</sup> See Ginnane, “The Control of Federal Administration by Congressional Resolutions and Committees,” 66 *Harv. L. Rev.* 569 (1953); Watson, *op. cit. supra*; Bolton, *The Legislative Veto: Unseparating the Powers* (American Enterprise Institute 1977). See generally the testimony collected in “Providing Reorganization Authority to the President” *Hearings on H.R. 3131 before a Subcommittee of the House Committee on Government Operations*, 95th Cong., 1st Sess. (1977), particularly the letter from Antonin Scalia, at 60. For a view more favorable to the veto’s constitutionality, see Stewart, “Constitutionality of the Legislative Veto,” 13 *Harv. J. Legislation* 593 (1976) See also Miller & Knapp, “The Congressional Veto: Preserving the Constitutional Framework,” 52 *Ind. L.J.* 367 (1977).

and Representatives,<sup>14</sup> is contrary to the validity of such clauses.

It is unlikely that any previous case has squarely presented to this Court the legislative veto question. Until recently, Congress enacted few statutes containing such vetoes. Moreover, in the past, legislative vetoes were rarely exercised, as we shall point out, because of the nature of the legislation involved. Further, some exercised vetoes involved the proposed expenditure of budgeted funds<sup>15</sup> or proposed governmental reorganization, where standing may be difficult to obtain. Finally, cases raising this issue here have been more appropriately decided on other grounds, see *Buckley v. Valeo*, 424 U.S. 1 (1976), or involved serious problems of ripeness or mootness. See *Clark v. Kimmit*, No. 75-1105, (October term 1976).

<sup>14</sup> See, e.g., 76 *Cong. Rec.* 3539 (1933) (Senator Byrnes); 84 *Cong. Rec.* 2477-78 (1939) (Representatives Taber and Wolcott); 83 *Cong. Rec.* 3090 (1939) (Senator King); 87 *Cong. Rec.* 1100, 1245, 1269, 1569, 2063-7 (1941) (Senators Clark, Gillette, McCarran, and Murdock); 87 *Cong. Rec.* 6504-07 (1941) (Senators Adams and Taft); 97 *Cong. Rec.* 5443 (1951) (Representative Patman); 100 *Cong. Rec.* 5095 (1954) (Senator Dirksen). See Watson, *op. cit.*, *supra* at 988.

<sup>15</sup> Of the sixty-four resolutions enacted between 1960 and 1975 pursuant to legislative veto authority, forty related to budget expenditure, deferrals and recessions. Of the remainder, eight were concurrent resolutions for the release of materials from the national stock pile, and five involved disapproval of executive reorganization measures. Three concerned federal employee pay levels; two, price controls on crude oil; two, election campaign practices; and one each concerning nuclear material use by foreign countries, and extending and fixing guidelines for the preservation of Presidential records. U.S. Library of Congress, "Interim Report on the Exercise of Congressional Review, Deferral and Disapproval Authority Over Proposed Executive Actions, 1960-75."

The constitutional issue, however, is of growing importance. While the issue was not of overriding importance in the past, the current situation has become far more serious. The number of resolutions or bills introduced in Congress that embody legislative vetoes has multiplied. A survey by the Library of Congress shows that of the 192 bills embodying legislative vetoes enacted between 1932 and 1975 more than half were enacted since 1970. Moreover, of 351 resolutions introduced between 1960 and 1975 for the purpose of vetoing Executive action taken under such bills, 244 were introduced in 1974 or 1975. Of the sixty-four such resolutions approved since 1960, 44 were approved in the single last year of the survey.<sup>16</sup>

This growing tendency to insert legislative vetoes in substantive legislation, together with the importance of removing serious legal clouds that might otherwise overhang critically important proposed legislation,<sup>17</sup> suggests that this Court<sup>18</sup> and the Solicitor General<sup>19</sup> are correct in recognizing the issue as important. This case presents the question squarely. Each branch of the federal govern-

<sup>16</sup> The survey referred to in note 15 above indicates that to hold the one-house veto unconstitutional is unlikely to cause any serious practical disruption in the administration of ongoing governmental programs.

<sup>17</sup> Consider, for example, the Administration's recent energy proposals. The House of Representatives is reported to have recently voted to subject exercises of the power to set natural gas prices to a one-house veto. *Washington Post*, June 3, 1977, p. 1. If this bill becomes law, gas producers will be uncertain of the validity of the prices they charge until the new law is tested in court—a process that could take months or years. In the meantime, the uncertainty will discourage badly needed investment.

<sup>18</sup> *Buckley v. Valeo*, 424 U.S. 1, 140, n. 176.

<sup>19</sup> Brief in *Clark v. Kimmit*, *supra* p. 6.

ment, including the Senate and the House of Representatives as *amici*, is represented by counsel and has briefed the issue below. Plaintiffs are aware of only two other cases presenting this issue now before the courts.<sup>20</sup>

B. While not arguing the merits in detail in this petition,<sup>21</sup> plaintiffs wish to call the Court's attention to the very basic nature of the constitutional issues raised by the majority opinion of the Court of Claims. For example, it is a fundamental constitutional tenet that Congress possesses only those powers delegated to it by the Constitution—powers that, with a few specifically designated exceptions,<sup>22</sup> are legislative in nature. The Court of Claims apparently suggests, however, that in exercising the one-house veto, a house is not engaged in a legislative act. Ct. Cl. Op. 55-60 (Appendix D). Yet how can this be? To exercise such a veto is not to act under authority otherwise specifically delegated to Congress by the Con-

<sup>20</sup> *Chadha v. Immigration and Naturalization Service*, No. 77-1702 (9th Cir.) currently pending before the Ninth Circuit, raises the question. Plaintiff, an alien, was ordered deported by a Congressional Committee under legislation delegating such power to a single committee of Congress. Agreement between plaintiff and the government may moot that case, however, before it reaches this Court. Also the Court of Appeals for the Fourth Circuit has yet to decide *McCorkle v. United States*, which also raises the issue, in a somewhat different context, of the constitutionality of Clause B of the Federal Salary Act of 1967.

<sup>21</sup> The merits are briefed extensively in three briefs submitted by plaintiffs in the court below and in responses by *amici*—the Senate and the House of Representatives. Copies of these briefs are available to the Court upon request from the Court of Claims. These issues are also thoroughly discussed in the articles cited in note 13 *supra*.

<sup>22</sup> The Constitution specifically delegates a number of nonlegislative powers, such as the power to confirm Presidential appointments, to one or the other house.

stitution. It is not an act (like information gathering) necessary to the legislative process. It is not a house-keeping detail. Where then, if it is not legislative, does a single House of Congress obtain the power to perform it?<sup>23</sup> Significantly, clause (B) itself refers to the adoption of *legislation* by either house. (See n. 8, *supra*.)

More importantly, the sections of the Constitution that grant authority to perform legislative acts reflect basic compromises designed to produce legislation that reflects a national, rather than a sectional, will. Both the principle of Presidential participation (embodied in the Presentment Clause, Art. I, Sec. 7, cl. 2) and the principle of bicameralism (embodied in the requirement that *both* houses approve *each* individual legislative action) were designed to prevent subgroups within Congress from legislating on their own.<sup>24</sup> Yet, the one-house veto allows such a subgroup to legislate. If a broad delegation of authority contains a one-house veto, the details of that authority may be filled, not by the administrative process nor by the legislative process (involving both houses and the President), but rather by a single house (or a single committee) simply vetoing contrary proposals made by the Executive. The one-house veto can thus exemplify that very delegation of legislative authority to subgroups

<sup>23</sup> *Amici* suggested in the court below that the "Necessary and Proper Clause" might bestow such power. But that clause cannot grant Congress power to legislate in any way it wishes (i.e. in a manner contrary to that provided in Article I), nor could it authorize Congress to engage in nonlegislative tasks (except those *specifically* delegated to Congress elsewhere in the Constitution). Otherwise Congress would be free, for example, to delegate judicial power to a subcommittee, or to ignore the procedural requirements for the enactment of legislation specifically set out in the Constitution.

<sup>24</sup> See Ginnane, n. 13, *supra*, at 594; Watson, n. 11, *supra*.

within Congress—its exercise unchecked by the need to secure the approval of the Congress as a whole—that the principles of presidential participation and of bicameralism were intended to prevent.

C. There are no ready answers to these constitutional difficulties. One cannot, for example, accurately characterize the one-house veto as a “practical” or “desirable” legislative device needed to check the power of the President. Congress has a host of alternative practical checks available.<sup>25</sup> And those checks, unlike the veto, cannot be used to grant to a single house (or to a single committee or committee chairman) the practical power to write (without check) the details of broadly phrased legislation, or to decide, on its own, for example, who shall and who shall not, receive tax rebates, or who shall be deported.<sup>26</sup>

<sup>25</sup> For one thing, Congress can provide that the legislation delegating authority expires in a short time. Thus the President will have to seek the approval of both houses of Congress for what he does by requesting the enactment of new legislation if he is to continue to exercise the authority. For another thing, Congress can tailor its statutes more specifically, thereby limiting the power that it fears the Executive will exercise in an undesirable way. Further, as in the present case, Congress can require the President, before taking action, to consult with Congressional representatives, whose views will carry significant political weight. Congress can also delegate the power at issue to an appropriately constituted commission for final decision. Finally, as in Clause (A) of the 1967 Act, (and the Federal Rules of Civil Procedure), it can provide that implementation of the Executive action will be delayed until it has time to consider it and to enact legislation preventing the Executive’s action from taking effect. While the President’s signature would be required, it is unlikely that in a salary matter like the present one, he would override Congressional views.

<sup>26</sup> See *Chadha v. Immigration and Naturalization Service*, discussed at n. 20, *supra*.

Simply stated, a single house or committee *thereof* cannot grant to itself the power to perform acts which Article II, Section 1 confers exclusively to the President: acts which by their nature or by lawful delegation are executive functions.<sup>27</sup>

Nor can one resolve the constitutional question by referring to the Separation of Powers doctrine as “a political maxim, not a technical rule of law,” Ct. Cl. Op. 64,<sup>28</sup> or by arguing that the line between Executive and Legislative functions is blurred—that the “Constitution expects a certain blending of powers.” Ct. Cl. Op. 65. In some instances—such as rule making—powers are in-

<sup>27</sup> Congress has apparently since recognized this fact. At the time the Senate exercised the one-house veto under § 359(1)(B) in 1974, and at the time this action was commenced, the statute in question provided that the President’s pay adjustments became effective *unless* within thirty days, one house of Congress disapproved them. Thus, one house was empowered to “undo” an executive act. Had Congress done nothing, the raises would have taken effect. On April 12, 1977, however, the Act was amended by Section 401 of Pub. L. 95-19 to provide that the President’s recommended salary adjustments would not take effect until *both* the Senate and the House had voted to approve them. While this mechanism does not resolve the unconstitutionality of the legislative veto in terms of Article I, Sections 1 and 7, it may be viewed as a recognition by Congress that the former provision invaded the President’s exclusive executive powers in violation of Article II, Section 1. Under the prior provision, the salary increase is the result of the President’s action; if Congress does nothing, the salary adjustments occur. Now, the President’s actions do not cause salary levels to be adjusted. If Congress does nothing, salary levels remain unchanged. Since the plaintiffs’ salary adjustments were barred under the former provision, of course, Senate Resolution 293 was unconstitutional under both Articles I and II.

<sup>28</sup> See, for example, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

deed blended. See *e.g.*, *Yakus v. United States*, 321 U.S. 414 (1944). Since all three branches of government inherently possess the power to make rules, it is obviously difficult to draw lines determining *how much* rule making authority Congress can grant the Executive before “rule making” becomes impermissible legislating. That difficulty, however, has never prevented courts from stopping any branch from exercising power plainly outside its constitutionally granted authority. *Kilbourn v. Thompson*, 103 U.S. 168 (1880). Thus, the courts have held that judges cannot give advisory opinions, for Article III does not grant them power to do so. *Muskrat v. United States*, 219 U.S. 346 (1911). And, members of Congress cannot take Executive action for the same reason.<sup>29</sup> *Springer v. Philippine Islands*, 277 U.S. 189 (1928); *Buckley v. Valeo*, 424 U.S. 1 (1976). It is difficult to believe that a court would sanction legislation that authorized one house or one committee to adjudicate a case or controversy or to “veto” complaints filed in a district court. The issue raised in this case is whether legislation authorizing one house of Congress to veto the exercise of validly delegated rule making authority is not just as plainly outside the powers granted to Congress by the Constitution, either because it does not constitute the enactment of legislation in accordance with the provisions of Article I or because it constitutes the unauthorized exercise of an Executive act in violation of Article II, or both.

Finally, it is misleading to claim that the insertion of a one-house veto in a piece of legislation does no more than to require the consent of both houses of Congress and the President before changes in the law take place—precisely the same result as the enactment of new legislation, Ct. Cl. Op. 60. The two methods have very different

<sup>29</sup> See n. 27, *supra*.

practical consequences. (Indeed, were this not so, legislators would not wish to include such a provision in their bills.) The difference appears obvious if one focuses upon the veto of detailed administrative decisions—decisions to award defense contracts, to make tax rebates, to write regulations. In such cases, to give one house the power to veto is effectively to give *one* house the power to make a detailed decision, a decision that would otherwise have been made either by the President or would at the least have been the subject of focused debate by *both* houses of Congress and the President.

D. In the Court below, the Government argued that Clause B is unconstitutional, but not *severable* from the remainder of the Act. An examination of the law on severability and the relevant legislative debates—which we shall summarize briefly here—strongly demonstrates, however, that Clause B is severable. At least three, and possibly all seven judges of the Court of Claims reached this conclusion.<sup>30</sup>

This Court’s test respecting severability was laid down in *Champlin Refining Co. v. Corporation Com’n*, 286 U.S. 210, 234 (1932):

“Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.”

<sup>30</sup> Three Court of Claims judges specifically wrote that Clause B was severable. The remaining four judges held that Clause B was constitutional and did not discuss severability. Since a holding of non-severability would have allowed the judges to avoid the constitutional question, the fact that they reached and decided that question may reflect a belief that Clause B is severable. *Cf. Ashwander v. TVA*, 297 U.S. 288 (1936).

See also *Electric Bond and Share Co. v. SEC*, 303 U.S. 419, 433-39 (1938), *Tilton v. Richardson*, 403 U.S. 672, 683-84 (1970).<sup>31</sup>

It is plain that without Clause B the remainder of the Act is, in the words of *Champlin*, "fully operative as law;" it is capable of standing alone, (See discussion regarding Clause (A), *infra*, at p. 19). It is also apparent that, had Congress known of Clause B's unconstitutionality, it would still have enacted the remaining provisions.

An examination of the legislative history of the relevant Act, the Postal Revenue and Federal Salary Act of 1967<sup>32</sup>, shows that neither the "one-house veto" nor judicial salary levels were of importance to the debate. The major salary issue concerned whether Congress should create a Commission that could set *Congressional* salaries. The House strongly favored the idea of a Commission; the Senate opposed it. At the last minute the Senate gave way in return for concessions on junk mail rates under other provisions of the Act.<sup>33</sup>

<sup>31</sup> This test stems from the general presumption in favor of constitutionality. In giving "full effect . . . to such [provisions] as are not repugnant to the Constitution," *Bank of Hamilton v. Dudley*, 2 Pet. 492, 526 (U.S. 1829), it simply applies "the cardinal principle of statutory construction . . . to save and not to destroy," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). It thus applies virtually unchanged whether or not the statute contains an express severability clause. *Tilton v. Richardson*, 403 U.S. 672, 683-84 (1970), *United States v. Jackson*, 390 U.S. 1 (1976); Stern, "Separability and Separability Clauses in the Supreme Court," 51 *Harv. L. Rev.* 76, 79 (1937).

<sup>32</sup> See 113 *Cong. Rec.* at 8493, 27288, 28406, 28409, 28411, 28612, 28641-4, 28622, 28879, 33590, 33972, 34013, 34014, 34022-3, 34212-5, 34220-2, 34236, 34241, 34255, 34261, 34410, 35524, 35811, 35822, 35839-41, 36088, 36100-8.

<sup>33</sup> See 113 *Cong. Rec.* 36102.

The Commission's opponents argued that Congressmen should be required to cast a clear, public vote on their own salary levels. This objection was met in several ways: 1) An amendment was passed, allowing Senators to vote on each part of a proposed increase separately, thereby preventing them from hiding a vote increasing their own pay by voting generally on the subject (See 113 *Cong. Rec.* 36100, 36101). 2) The Conference Committee eliminated a provision that might have allowed a Senator to hide a vote for an increase by voting for a wage/expense package. 3) Proponents of the Commission pointed to clause (A), giving both houses a chance to disapprove a proposed pay increase by enacting legislation to the contrary.

Throughout the debates Clause A and Clause B were referred to together. No one argued that (B) was of particular importance. This fact is not surprising, for (A), which would delay a proposed pay raise from taking effect so that *Congress might enact legislation to the contrary, was surely sufficient* to achieve Congress's major purpose. The introduction of such legislation would force each Congressman to vote for or against a proposed pay increase. If a house voted down its own pay increase, the other house would not force a pay increase upon it. And, it is inconceivable that if both houses voted not to take a pay raise themselves, the President would refuse to sign such a measure into law. As practical matter, Clause (B)—which is here at issue—offered little additional protection beyond Clause (A), which is plainly constitutional. Its retention was not needed to satisfy any major Congressional objective.

This conclusion is reinforced by the fact that the relevant Act of which clause (B) forms a part, deals not only

with federal salaries, but also (and primarily) with mail rates. (P.L. 90-206, found at 81 Stat. 613). The political debate and the resulting legislative modifications intimately tied together the Salary Commission and postal rates. (See *e.g.*, 113 *Cong. Rec.* 36102). Thus, to hold clause (B) unconstitutional and not severable is to risk making unlawful most postal rates, the salaries paid postal workers, and the salaries paid to nearly all other government employees since 1967. The prospect of these consequences led the three dissenting judges in the Court of Claims to characterize such a result as "patently ludicrous" (Ct. Cl. Op. 92) and absurd (Ct. Cl. Op. 102). As previously noted, the remaining four judges did not reach the issue or consider its consequences. It is absurd to think that Congress would have preferred such a result to the continued operation of the statute without Clause B (any untoward result of which Congress could far more easily repair). Rather, the presence of clause (A), the Byrd Amendment, and the delay before the President's recommendations take effect, together with the legislative history (showing that the basic argument was about delegation itself and the need for legislators to reveal publicly their positions on legislative salaries) all suggest clause (B) was not essential to any Congressional purpose and that Congress would have preferred that the Postal Revenue and Federal Salary Act of 1967 stand without it.<sup>34</sup>

<sup>34</sup> Our research also discloses some relevant precedent in previous Executive Branch treatment of bills with one-house veto clauses. Presidents, believing such clauses unconstitutional, have signed bills containing them when they believed that the offending clause was severable. [See Jackson, "A Presidential Legal Opinion", 66 *Harv. L. Rev.* 1353 (1953).] Otherwise they apparently would have vetoed the bill. President Johnson seemingly believed

**II. WHETHER PLAINTIFFS' COMPENSATION HAS BEEN DISCRIMINATORILY DIMINISHED IN VIOLATION OF THE CONSTITUTION IS ALSO AN ISSUE OF LONG RANGE INSTITUTIONAL IMPORTANCE, WHICH OUGHT TO BE RESOLVED BY THIS COURT.**

A. Article III, Section 1, of the Constitution provides that judges shall receive "a Compensation, which shall not be diminished." Plaintiffs believe that this clause does not simply protect the nominal dollar value of a judge's salary but that it offers *some* protection for a judge's real compensation as well. Specifically, it protects this compensation during a time of serious inflation when Congress maintains the real compensation of others but not that of judges.

Plaintiffs base their claim upon four grounds.<sup>35</sup> First, the purposes of Article III, Section 1, demand protection

---

<sup>35</sup> (Continued)

clause (B) unconstitutional [See *e.g.* *Public papers of the Presidents of the United States*: Lyndon B. Johnson 1963-68, at 861-62, 1249-51 (1965); 1 *Weekly Comp. Pres. Docs.* 132, 432-33 (1965); 111 *Cong. Rec.* 12639-40 (1965)], yet he signed the 1967 Act—a fact that suggests he also believed clause (B) was severable.

<sup>35</sup> In the Court below, the government also argued a) that the Court of Claims lacked jurisdiction, and b) that this claim raised a "political question." Plaintiffs consider both these contentions to be without foundation. Jurisdiction in the Court of Claims rests upon 28 U.S.C. §1491 which gives that court jurisdiction

"to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . ."

This claim is founded upon Article III, Section 1, of the Constitution, which imposes upon the United States a "duty to pay" a judge continued compensation once it has initially been set by Congress. *Cf. Jacobs v. United States*, 290 U.S. 13 (1933); *Bivens v. Six Unknown Named Agents*

of real, not nominal dollar, compensation. The major purpose of that clause is to free judges from any feeling of dependence upon the legislature for the maintenance of their compensation. See *Federalist* No. 51 (Madison), *Federalist* No. 79 (Hamilton). It is designed to help render the judge "perfectly and completely independent, with nothing to influence or control him, but God and his conscience." Marshall, C.J., quoted in *Evans v. Gore*, 253 U.S. 245, 250 (1920).<sup>36</sup>

If the Compensation Clause protects *only* nominal dollar compensation, this objective cannot be achieved, for during a time of serious inflation, each and every decision by Congress concerning the maintenance of judges' real compensation has precisely the same effect on judicial independence as a decision to cut judicial compensation when prices are constant. In both situations, judges must fear, in precisely the same way, that negative Congressional action will force them to spend their savings, to look for ways to supplement their income, or to accept radical change in their way of life.<sup>37</sup>

<sup>36</sup> (Continued)

of *Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This claim falls within none of the legal categories set forth in *Baker v. Carr*, 369 U.S. 186 (1962) and thus does not constitute a political question. Cf. *Powell v. McCormack*, 395 U.S. 486 (1969). The Court of Claims rejected out of hand these two arguments of the Government. We do not conceive that these specious arguments will be renewed in this Court.

<sup>36</sup> A further purpose of the clause was to attract highly qualified men to the bench. 1 *Kent Comm.* 294. A final purpose was to reinforce the "tenure of office" requirement by preventing diminished salaries from forcing judges to leave the bench. 2 *Story* §1628.

<sup>37</sup> Thus, the effect of a Congressional decision not to keep real income constant during inflation is totally different from a decision not to increase real income. Congressional

Second, the history surrounding the adoption of the Compensation Clause, while not determinative, apparently supports plaintiffs' interpretation. The Constitution's Framers were fully aware of the problem of inflation. They had seen the price level rise 188% between 1775 and 1781.<sup>38</sup> They had seen the judges of the Virginia Court of Appeals argue that "the various substitutions of paper money . . . for specie . . . operating greatly to the diminution of their salaries," constituted a departure from constitutional principle. *Remonstrance of the Judges*, 4 Call (Va.) 135 (1788). Against this background, Madison's words and actions in the Constitutional debates suggest he meant "Compensation" to refer to "real compensation".<sup>39</sup>

Third, this Court has uniformly interpreted the Compensation Clause broadly in accord with Madison's intent

<sup>37</sup> (Continued)

power to *increase* real income—a power left to its discretion under Article III, Section 1—may raise expectations and hopes but it does not create the type of dependence created by the power to *diminish* real income. It is the latter that produces fear of lower living standards (quite different from hopes of higher ones), and it is this fear that is produced in an identical way by the power to cut nominal dollar salaries when prices are rising. See generally, O. Ritter & W. Silber, *Money* 28-29 (1970).

A failure to maintain real compensation in the presence of severe inflation also discourages recruitment to the bench, [see, e.g., affidavit of Senator Percy, submitted in support of plaintiffs' motion for summary judgment in the Court of Claims, and Sprecher, "The Threat to Judicial Independence," 51 *Ind. L.J.* 380 (1976)] and forces sitting judges to resign.

<sup>38</sup> See, *Historical Statistics of the United States—Colonial Times—1957*, 116. Suits by persons for payment in real, rather than nominal, currency were well known at the time.

<sup>39</sup> See Appendix C (p. 9a).

that judges be "as little dependent as possible" on the other two branches. *Federalist* No. 51. Thus, in *Evans v. Gore*, 253 U.S. 245 (1920), the Court held that the Clause must be construed, "not restrictively, but in accordance with its spirit . . ." 253 U.S. at 253-54, and that the Clause prohibited any diminution whether it was "direct . . . , indirect, or even evasive." 253 U.S. at 254. In *O'Donoghue v. United States*, 289 U.S. 516 (1933), the Court, reiterating the need to keep the judiciary "free from the remotest influence, direct or indirect, of either of the other two powers," held that a judge, in regard to his compensation, should "have no apprehension lest his situation may be changed to his disadvantage."<sup>40</sup> See also *Miles v. Graham*, 268 U.S. 501 (1925).

*Evans v. Gore* was much criticized, for it held that judges could not be subjected to an income tax laid uniformly on all citizens. *O'Malley v. Woodrough*, 307 U.S. 277 (1939), which held that Congress could make future judicial appointments subject to tax, is thought by some to represent a retreat from *Evans*. It is important to note, however, that the *Woodrough* Court did not overrule *Evans* (while it did overrule *Miles*) and did not retreat from the *principles* respecting the meaning, scope and purposes of Article III, Section 1, laid

<sup>40</sup> The Court went on to state:

In the light of the foregoing views,—time honored and never discredited—it is not extravagant to say that there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation, not for his private advantage—which, if that were all, he might willingly forego—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people. 289 U.S. at 533.

down in any of the earlier cases. Rather, that Court suggested that a *nondiscriminatory* tax laid generally upon *all* persons did not violate the Compensation Clause, for, as Justice Holmes (dissenting in *Evans*) put it, "[t]o require a man to pay the taxes that *all* other men have to pay cannot *possibly* be made an instrument to attack his independence as a judge." (Emphasis added). 253 U.S. at 265. While a judge is most unlikely to believe that hostility to his opinions could affect a Congressional decision to impose a general income tax, he might easily believe that hostility to his opinions could affect a Congressional decision against maintaining real judicial compensation.

Fourth, the alternative to accepting plaintiffs' interpretation of Article III, Section 1, is to adopt an interpretation (that "compensation" means only "nominal dollar" compensation) which will reduce the protections of that Article to a nullity. As the judges of the Virginia Court of Appeals remonstrated in 1788:

vain would be the precautions of the founders of our government to secure liberty, if the legislature, though restrained from changing the tenure of judicial offices, are at liberty to compel a resignation by reducing salaries to a copper. 4 Call (Va.) 135, 145.

Serious inflation has precisely that effect; it can reduce the actual dollar value of salaries by several percentage points per year; over a ten year period, even a "mild" 7% inflation rate will cut actual salaries in half.

On the other hand, to accept plaintiffs' interpretation of the clause does *not* necessarily mean that Congress must adjust judicial salaries with every jog in the Consumer Price Index. Rather, the clause can be interpreted in a practical manner consistent with its purposes. It need impose no more than an obligation to ad-

just the nominal salaries of judges from time to time so that there is no serious decline over a period of years," and (following the suggestion of Justice Frankfurter in *Woodrough* and Justice Holmes in *Evans*) to act *non-discriminatorily* when adjusting governmental salaries."

B. The Court of Claims evidently accepts plaintiff's basic argument, for it interprets the Compensation Clause "to provide protection against the diminution of judges' compensation in the event of a discriminatory attack on the judiciary." Ct. Cl. Op. 38. If the Court of Claims is correct in believing that the Clause would forbid discriminatory decreases in nominal salaries during serious

---

"In this respect, the obligation that Article III, Section 1, imposes upon Congress is like the obligation that the Equal Protection Clause imposes upon the States in the area of electoral apportionment. Although the basic Constitutional obligation is "one man, one vote," *Reynolds v. Sims*, 377 U.S. 533 (1964), the states have broad leeway as to the particular apportionment plan they adopt. Only when this range of discretion is exceeded will the Courts hold a plan unconstitutional. Similarly, as long as Congress adjusts nominal salaries from time to time, so that judges' actual salaries are not cut to a significantly greater extent than those of other federal officials or those of the average American worker, the evils that the Compensation Clause protects against cannot arise.

"In doing so, it would follow a tradition deeply embedded in constitutional law. Thus, for example, the Constitution forbids the imposition of a "tax or duty" upon exports, Article I, Section 9. Nevertheless, the Court has sustained the validity of a general tax on net income even though that income is derived in part from exporting, as long as "there is no discrimination." *Peck & Co. v. Lowe*, 247 U.S. 165, 175 (1918). Similarly, even though a state cannot interfere with interstate commerce, it can tax the net receipts derived from interstate commerce, or even gross receipts, always assuming "there be no discrimination against interstate commerce." *United States Glue Co. v. Oak Creek*, 247 U.S. 321 (1918); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938).

inflation, the word "compensation" must mean real compensation.

The court went on to reject plaintiffs' claims, however, on the ground that plaintiffs failed to show discrimination. The court states:

"While federal judges may well have borne the brunt of inflation in recent years, they have not been alone. They are part of a class, not large in relation to the total number of employed Americans, but numbering about 2,500 judges, civil servants on the Executive Schedule, and Members of Congress, and 20,000 GS-15 through -18 civil servants. If Congress intended to mount an attack on the independence of the judiciary by means of a salary freeze in the face of high inflation, why would it have included in the freeze the top level civil servants and even, to a lesser extent, its own Members? . . . Reasons other than a desire to punish the judges or drive them from office appear to lie behind the 7-year omission of a pay raise. Ct. Cl. Op. 44-45.

This paragraph—the crux of the Court's opinion—raises three serious problems. For one thing, as a factual matter, the class of government employees treated like judges was far smaller than the court suggests. While the court correctly questions the inclusion of Members of Congress<sup>43</sup>, it incorrectly states that 20,000 GS-15 through -18 civil servants should be grouped with the judges. In fact, as the court's opinion notes earlier (at p. 17), between 1969 and 1976, pay increased "in the so-called 'super grades' GS 16-18 by 48.9%." Aside from judges, only a handful

---

<sup>43</sup> The Court notes that "Members of Congress have in recent years given themselves substantial adjustments in staff, travel, and certain other tax-free expense allowances, all of which tend to ease the impact of inflation." Ct. Cl. Op. 44, n. 11.

of persons in top level politically sensitive positions, suffered a serious diminution in real compensation.

More important, the Court of Claims uses an incorrect standard for judging the existence of discrimination. The court evidently believes plaintiffs must show a subjective intent on the part of Congress to interfere with judicial independence. The issue, however, is not subjective Congressional intent. Rather it is the objective threat (or perceived threat) to the independence of the judiciary. The correct question is whether a grant to Congress of the power at issue could lead judges to suspect (or the public to think they suspect) any relationship between how they decide cases and the maintenance of their compensation. As long as Congress remains free to force the judiciary to accept a cut in real compensation, simply by placing it in a group with a handful of others whose compensation is not maintained, this question must be answered in the affirmative."

---

"This standard is suggested by this Court's treatment of similar cases under the Commerce Clause. States may tax or restrict interstate commerce as long as they tax or restrict intrastate commerce similarly, see *South Carolina Hwy. Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938), but a state cannot save an ordinance which discriminates against interstate commerce simply by grouping a certain amount of local commerce along with it in the disfavored class. *Dean Milk v. City of Madison*, 340 U.S. 349, 354 n. 4 (1951). Nor is a law that discriminates against blacks saved from invalidity simply because a number of whites may also be adversely affected. The Court should also note that Justice Holmes, dissenting in *Evans*, and Justice Frankfurter, writing in *Woodrough*, would sustain the constitutionality of taxing judges' salaries, not because a handful of others were taxed as well, nor because plaintiffs failed to prove a discriminatory intent; but, rather, because the income tax applied to virtually all other persons. Thus it could not possibly have been perceived as a threat to independence. See *Evans v. Gore*, *supra* at 265; *O'Malley v. Woodrough*, *supra* at 282; Brief of the Solicitor General in *O'Malley v. Woodrough* at 12.

Further, in terms of the purposes of the Compensation Clause, it is singularly inappropriate to classify judges together with Congressmen, Presidential appointees, and a few top civil servants. These latter all hold politically sensitive jobs. It may be realistic that their compensation respond to political pressures; it is totally undesirable for judicial compensation so to respond. The very purpose of Article III is to guarantee the contrary. Thus, it is not surprising that the one case considering this type of issue, *Commonwealth v. Mann*, 5 Watts & Serg. 403 (Pa. 1893) held that a direct tax upon salaries of all public officials taxed judges discriminatorily. (See Brief of the Solicitor General in *Woodrough*, at 33-34).

Finally, it is both difficult and inappropriate for a court to attempt to assess whether Congress subjectively intended to threaten the judiciary. Congressmen frequently criticize the judiciary—often quite vigorously." One can readily find references to criticism of judicial actions in Congressional discussion of judicial salaries."

---

"See, e.g., 122 *Cong. Rec.* E3901-3902 (Aug. 20, 1976): "It is clearly the courts that are at fault; it is their illogical and inconsistent interpretation of the law that is the problem, not the actual law. . . . Such obvious overstepping of bounds by the courts is precisely why the Founding Fathers gave Congress a means to check the power of the courts." Or, consider 122 *Cong. Rec.* S14989 (Aug. 31, 1976): "Today we have judges virtually accountable to no one, invading the sphere of the people's elected representatives, handing down decisions which have adverse impact on the lives of all of us."

"In September 1976 Congress refused to appropriate money to pay for a cost of living increase for the judiciary authorized by law. One speaker commented as follows: "The plain fact is this, that even under the interpretation of the gentleman from Illinois, we are saying

The Court of Claims test, in making the lawfulness of Congressional action turn on the presence or absence of such criticisms, would require an assessment of the impact of such criticism on later Congressional action. It may thereby inhibit the expression of such views by Members of Congress. Yet, surely it is not the purpose of Article III, Section 1, to inhibit or to forbid, in any way, the expression of Congressional criticism of the judiciary.<sup>47</sup>

C. Despite the recent 28.9% judicial pay increase approved by Congress in February 1977, the basic issue here raised—the extent to which the Compensation Clause offers protection in time of inflation—is of continuing importance. Inflation continues and is likely to remain a problem throughout the foreseeable future.

Congress, frequently will have to consider whether to maintain judicial compensation—and whether to appropriate funds previously authorized—again and again. It has already decided twice not to appropriate funds for

---

<sup>47</sup> (Continued)

that it is lovely for the members of the Supreme Court to receive a \$4,000 or \$5,000 increase next month, and it is lovely for the members of the appellate and the district courts, judges that some of my friends do not like because of their busing orders, it is great to give them a pay increase and it is great to pay some third assistant to the President who is dealing with the chairman of the Committee on Appropriations and the leaders of the House of Representatives, so that they will perhaps make more money than the Members of the House of Representatives, that this is all very good." 122 Cong. Rec. H9367 (Sept. 1, 1976).

<sup>48</sup> Its purpose is to prevent Congress from *acting* by diminishing the compensation of the judges it criticizes.

cost of living increases in judges' salaries authorized by law.<sup>48</sup>

The Court of Claims opinion is relevant to, and casts uncertainty upon, the legality of past refusals to appropriate and other future actions that Congress may take. There is, therefore, a pressing need to clarify Congress's Constitutional obligation, and to obviate the undesirable possibility of continued litigation by judges over any or all of these additional actions Congress has taken, or will take, in respect to judicial pay. In plaintiffs' view, it is of critical importance to the maintenance of a proper con-

---

<sup>48</sup> The Executive Salary Cost of Living Adjustment Act, 5 USC §5332, which was passed August 9, 1975, provides that judges shall receive an annual cost of living increase comparable to the average annual pay adjustment received by all other federal employees under the Federal Pay Comparability Act of 1970, 5 USC §5301 *et seq.* Congress, however, refused on October 1, 1976, pursuant to Pub. L. 94-440, to appropriate funds necessary to pay the cost of living adjustments which took effect October 1, 1976. Again, effective July 11, 1977, pursuant to Pub. L. 95-66, Congress refused to allow payment of the cost-of-living increases which would have taken effect in October of 1977.

In this particular situation, we see instances in which Congress, having fixed judicial salary levels by law, has diminished the compensation of judges simply by refusing to appropriate the necessary funds. There is no tenable distinction between that conduct and a straight forward reduction in judicial salary levels. Neither can either of these situations be rationally distinguished from the Senate's veto of the judicial pay adjustments made by the President in 1974. This entire situation calls for review by this Court *at this time*, since the question of whether to appropriate funds for cost-of-living adjustments which take effect automatically will arise every year, and the pay adjustments made pursuant to the Federal Salary Act of 1967 will face the possibility of legislative veto every four years.

stitutional relationship among the three branches of government that this Court specify the extent to which the Compensation Clause protects the judiciary by denying Congress powers that may threaten its independence and its integrity.

### CONCLUSION

For the reasons set out above, Petitioners respectfully submit that the petition for certiorari should be granted.

Respectfully submitted,

ARTHUR J. GOLDBERG  
1101 17th Street N.W.  
Suite 1100  
Washington, D.C. 20036

Of Counsel

STEPHEN G. BREYER  
1545 Massachusetts Avenue  
Cambridge, Massachusetts

KEVIN M. FORDE  
RICHARD J. PRENDERGAST  
111 W. Washington Street  
Chicago, Illinois

## APPENDIX A

### CONSTITUTIONAL PROVISIONS

#### ARTICLE I SECTION 1

LEGISLATIVE POWERS VESTED IN CONGRESS.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

#### ARTICLE I, SECTION 7, CLAUSE 2

APPROVAL OR VETO OF BILLS—PASSAGE OVER VETO.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

ARTICLE II, SECTION 1, CLAUSE 1

PRESIDENT—TENURE.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

ARTICLE III, SECTION 1

SUPREME COURT AND INFERIOR COURTS—  
JUDGES AND COMPENSATION.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

**STATUTORY PROVISIONS**

2 U.S.C. §§358-360 provide as follows:

§358. Recommendations of the President with respect to pay.—The President shall include, in the budget next transmitted by him to the Congress after the date of the submission of the report and recommendations of the Commission under subsection (g) of this section [2 USCS §357], his recommendations with respect to the exact rates of pay which he deems advisable, for those offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of subsection (f), of this section [2 USCS §356(A)-(D)]. As used in this subsection [section], the term "budget" means the budget referred to in section 201 of the Budget and Accounting Act, 1921, as amended (31 USC 11) [31 USCS §11].

(Dec. 16, 1967, P. L. 90-206, Title II, §225(h), 81 Stat. 644.)

§359. Effective date of recommendations of the President.—(1) Except as provided in paragraph (2) of this subsection [section], all or part (as the case may be) of the recommendations of the President transmitted to the Congress in the budget under subsection (h) of this section [2 USCS §358] shall become effective at the beginning of the first pay period which begins after the thirtieth day following the transmittal of such recommendations in the budget; but only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—

(A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations,

(B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations, or

(C) both.

(2) Any part of the recommendations of the President may, in accordance with express provisions of such recommendations, be made operative on a date later than the date on which such recommendations otherwise are to take effect. (Dec. 16, 1967, P. L. 90-206, Title II, §225(i), 81 Stat. 644.)

§360. Effect of recommendations of the President on existing law and prior presidential recommendations.—The recommendations of the President transmitted to the Congress immediately following a review conducted by the Commission in one of the fiscal years referred to in subsection (b)(2) and (3) of this section

[2 USCS §352(2), (3)] shall be held and considered to modify, supersede, or render inapplicable, as the case may be, to the extent inconsistent therewith—

(A) all provisions of law enacted prior to the effective date or dates of all or part (as the case may be) of such recommendations (other than any provision of law enacted in the period specified in paragraph (1) of subsection (i) of this section [USCS §359(1) of this title] with respect to such recommendations), and

(B) any prior recommendations of the President which take effect under this section [2 USCS §§351-361]. (Dec. 16, 1967, P. L. 90-206, Title II, §225(j), 81 Stat. 644.)

## APPENDIX B

The Petitioners in these consolidated cases are listed below, in alphabetical order, followed by the appropriate Court of Claims case number and the Petitioner's District or Circuit Court:\*

C. Clyde Atkins (No. 41-76) (S.D. Fla.)  
George H. Barlow (No. 357-76) (D.N.J.)  
Allen E. Barrow (No. 357-76) (N.D. Okla.)  
John R. Bartels (No. 357-76) (E.D. N.Y.)  
Louis C. Bechtle (No. 132-76) (E.D. Penn.)  
Edward R. Becker (No. 132-76) (E.D. Penn.)  
William H. Becker (No. 41-76) (W.D. Mo.)  
Paul Benson (No. 357-76) (D. North Dakota)  
John Biggs (No. 132-76) (CA 3rd)  
C. Stanley Blair (No. 357-76) (D.Md.)  
Luther Bohanon (No. 132-76) (W. & E.D. Okl.)  
George H. Boldt (No. 357-76) (W.D. Wash.)  
Jean S. Breitenstein (No. 357-76) (CA 10th)  
Raymond J. Broderick (No. 132-76) (E.D. Penn.)  
Frederick van P. Bryan (No. 357-76) (CA 10th)  
Lloyd H. Burke (No. 41-76) (N.D. Calif.)  
William J. Campbell (No. 132-76) (N.D. Ill.)  
John M. Cannella (No. 357-76) (S.D. N.Y.)  
Estate of Oliver J. Carter (No. 41-76) (N.D. Cal.)  
Fred J. Cassibry (No. 41-76) (E.D. La.)

---

\* The Honorable Wade H. McCree has withdrawn voluntarily from this litigation because of his recent appointment as Solicitor General, as has the Honorable Donald R. Ross of the United States Court of Appeals for the Eighth Circuit. In addition, the following former plaintiffs have chosen not to participate in this petition for certiorari: Ruggero J. Aldisert (CA 3rd); James M. Carter (CA 9th); Ben C. Dawkins (W.D. La.); Floyd R. Gibson (CA 8th); William J. Nealon (M.D. Penn.); Bernard Newman (CC, N.Y.); Adrian A. Spears (W.D. Texas); Hubert I. Teitelbaum (W.D. Penn.)

Latham Castle (No. 357-76) (CA 7th)  
Thomas J. Clary (No. 132-76) (E.D. Penn.)  
Mitchell H. Cohen (No. 357-76) (D.N.J.)  
Samuel Conti (No. 41-76) (N.D. Calif.)  
James A. Coolahan (No. 357-76) (D.N.J.)  
Howard F. Corcoran (No. 41-76) (D.C. D.C.)  
Walter Early Craig (No. 41-76) (D.Ariz.)  
Walter J. Cummings (No. 357-76) (CA 7th)  
Jesse W. Curtis (No. 41-76) (C.D. Calif.)  
Ronald N. Davies (No. 357-76) (D. North Dakota)  
John Morgan Davis (No. 357-76) (E.D. Penn.)  
J. William Ditter, Jr. (No. 357-76) (E.D. Penn.)  
J. Robert Elliott (No. 357-76) (M.D. Ga.)  
Peter T. Fay (No. 41-76) (S.D. Fla.)  
John Feikens (No. 357-76) (E.D. Mich.)  
Wilfred Feinberg (No. 357-76) (CA 2nd)  
Warren J. Ferguson (No. 41-76) (C.D. Calif.)  
Robert Firth (No. 41-76) (C. D. Calif.)  
Clarkson S. Fisher (No. 357-76) (D.N.J.)  
Roger D. Foley (No. 41-76) (D. Nev.)  
Noel P. Fox (No. 357-76) (W.D. Mich.)  
Ralph M. Freeman (No. 132-76) (E. D. Mich.)  
Charles B. Fulton (No. 41-76) (S. D. Fla.)  
Leonard I. Garth (No. 132-76) (CA 3rd)  
James F. Gordon (No. 132-76) (W.D. Ky.)  
Myron L. Gordon (No. 132-76) (E.D. Wisc.)  
Estate of Wallace S. Gourley (No. 357-76) (W. D. Penn.)  
William P. Gray (No. 41-76) (C. D. Calif.)  
Lawrence Gubow (No. 357-76) (E.D. Mich.)  
Peirson M. Hall (No. 132-76) (C.D. Calif.)  
George B. Harris (No. 357-76) (N.D. Calif.)  
Oren Harris (No. 357-76) (E. & W.D. Ark.)  
George L. Hart, Jr. (No. 41-76) (D.C. D.C.)  
Estate of John S. Hastings (No. 357-76) (CA 7th)  
A. Andrew Hauk (No. 41-76) (C. D. Calif.)  
A. Leon Higginbotham, Jr. (No. 132-76) (E. D. Penn.)  
Irving Hill (No. 41-76) (C. D. Calif.)  
Julius J. Hoffman (No. 132-76) (N. D. Ill.)  
Daniel H. Huyett, III (No. 357-76) (E.D. Penn.)

Anthony Julian (No. 357-76) (D. Mass.)  
Damon J. Keith (No. 132-76) (S.D. N.Y.)  
James Lawrence King (No. 41-76) (S.D. Fla.)  
Samuel P. King (No. 41-76) (D. Hawaii)  
Alfred Y. Kirkland (No. 357-76) (N.D. Ill.)  
Frederick B. Lacey (No. 357-76) (D.N.J.)  
Thomas D. Lambros (No. 41-76) (N.D. Ohio)  
Frederick Landis (No. 357-76) (CC, N.Y.)  
Morris E. Lasker (No. 132-76) (S.D. N.Y.)  
James L. Latchum (No. 357-76) (D.Del.)  
Caleb R. Layton, III (No. 357-76) (D.Del.)  
Joseph S. Lord (No. 41-76) (E.D. Penn.)  
Miles W. Lord (No. 357-76) (D. Minn.)  
Malcolm M. Lucas (No. 41-76) (C.D. Calif.)  
Alfred L. Luongo (No. 132-76) (E.D. Penn.)  
Lawrence T. Lydick (No. 132-76) (C.D. Calif.)  
Estate of William J. Lynch (No. 41-76) (N.D. Ill.)  
Thomas J. MacBride (No. 41-76) (E. D. Calif.)  
Walter R. Mansfield (No. 41-76) (CA 2nd)  
Albert B. Maris (No. 132-76) (CA 3rd)  
Abraham L. Marovitz (No. 132-76) (N. D. Ill.)  
Frank J. McGarr (No. 41-76) (N. D. Ill.)  
Edward J. McManus (No. 132-76) (N. D. Iowa)  
William O. Mehrtens (No. 132-76) (S. D. Fla.)  
Bernard T. Moynahan, Jr. (No. 357-76) (E. D. Ky.)  
C. A. Muecke (No. 132-76) (D. Ariz.)  
Malcolm Muir (No. 357-76) (M.D. Penn.)  
Edward R. Neaher (No. 357-76) (E.D. N.Y.)  
Clarence C. Newcomer (No. 132-76) (E.D. Penn.)  
Edmund L. Palmieri (No. 132-76) (S.D. N.Y.)  
James B. Parsons (No. 41-76) (N.D. Ill.)  
John W. Peck (No. 132-76) (CA 6th)  
Robert F. Peckham (No. 41-76) (N.D. Calif.)  
Martin Pence (No. 132-76) (D. Hawaii)  
Joseph Sam Perry (No. 132-76) (N.D. Ill.)  
Paul P. Rao (No. 357-76) (CC, N.Y.)  
John W. Reynolds (No. 132-76) (E. D. Wisc.)  
Scovel Richardson (No. 357-76) (CC, N.Y.)  
Edwin A. Robson (No. 132-76) (N. D. Ill.)  
Norman C. Roettger, Jr. (No. 41-76) (S. D. Fla.)

Samuel M. Rosenstein (No. 357-76) (CC, Miami, Fla.)  
Carl B. Rubin (No. 132-76) (S.D. Ohio)  
Robert H. Schnacke (No. 41-76) (N.D. Calif.)  
Murray M. Schwartz (No. 132-76) (D. Del.)  
Nauman S. Scott (No. 357-76) (W.D. La.)  
Woodrow Seals (No. 357-76) (S.D. Texas)  
Collins J. Seitz (No. 41-76) (CA 3rd)  
John V. Singleton, Jr. (No. 41-76) (S.D. Texas)  
Talbot Smith (No. 357-76) (E.D. Mich.)  
Herbert P. Sorg (No. 357-76) (W.D. Pa.)  
Robert A. Sprecher (No. 41-76) (CA 7th)  
Austin L. Staley (No. 357-76) (CA 3rd)  
Edwin D. Steel, Jr. (No. 132-76) (D. Del.)  
Albert Lee Stephens, Jr. (No. 41-76) (C.D. Calif.)  
Herbert J. Stern (No. 357-76) (D. N.J.)  
Bruce R. Thompson (No. 132-76) (D. Nev.)  
Thomas P. Thornton (No. 357-76) (E.D. Mich.)  
E. Mac Troutman (No. 357-76) (E.D. Pa.)  
James A. von der Heydt (No. 132-76) (D. Alaska)  
Francis C. Whelan (No. 41-76) (C.D. Calif.)  
Lawrence A. Whipple (No. 357-76) (D. N.J.)  
Hubert L. Will (No. 41-76) (N.D. Ill.)  
David W. Williams (No. 41-76) (C.D. Calif.)  
Spencer Williams (No. 41-76) (N.D. Calif.)  
Harrison L. Winter (No. 41-76) (CA 4th)  
Albert C. Wollenberg (No. 357-76) (N.D. Calif.)  
John H. Wood, Jr. (No. 132-76) (W.D. Texas)  
Caleb M. Wright (No. 357-76) (D. Del.)  
George C. Young (No. 357-76) (M.D. Fla.)  
Joseph H. Young (No. 41-76) (D. Md.)  
Alfonso J. Zirpoli (No. 357-76) (N.D. Calif.)

## APPENDIX C

From: Max Farrand, *The Records of the Federal Convention of 1787*, Vol. 2 (1966)

FARRAND AT PP. 44-45 (RE: JULY 18, 1787):

[Mr.] Mr[adison] moved that the Judges should be nominated by the Executive, & such nomination should become an appointment [if not] disagreed to within .. days by  $\frac{2}{3}$  of the 2d. branch. Mr. Govr. [Morris] 2ded. the motion. By common consent the consideration of it was postponed till tomorrow.

"[To hold their offices during good behavior" & "to receive fixed salaries" agreed to next con:]

"In which (salaries of Judges) no increase or diminution shall be made, [so as to affect the persons at the time in office.]"

Mr. Govr. Morris moved to strike out "or increase". He thought the Legislature ought to be at liberty to increase salaries as circumstances might require, and that this would not create any improper dependence in the Judges.

Doctr. Franklin [was in favor of the motion], Money may not only become plentier, but the business of the department may increase as the Country becomes more populous.

Mr. [Madison.] The dependance will be less if the *increase alone* should be permitted, but it will be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter. If at such a crisis there should be in Court suits to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to suffered, if it

can be prevented. The variations in the value of money, may be guarded agst. by taking for a standard wheat or some other thing of permanent value. The increase of business will be provided for by an increase of the number who are to do it. An increase of salaries may be easily so contrived as not to effect persons in office.

Mr. Govr. Morris. The value of money may not only alter but the State of Society may alter. In this event the same quantity of wheat, the same value would not be the same compensation. The Amount of salaries must always be regulated by the manners & the style of living in a Country. The increase of business can not be provided for in the supreme tribunal in the way that has been mentioned. All the business of a certain description whether more or less must be done in that single tribunal—Additional labor alone in the Judges can provide for additional business. Additional compensation therefore ought not to be prohibited.

On the question for striking out “or increase”.

Mas. ay. Cont. ay. Pa. ay. Del. ay. Md. ay. Va. no. N.C. no. S.C. ay. Geo. [absent] [Ayes—6; noes—2; absent—1.] [The whole clause as amended was then agreed to nem: con:]

FARRAND AT PP. 429-430 (RE: AUGUST 27, 1787). Mr. Madison & Mr. McHenry moved to reinstate the words “increased or” before the word “diminished” in the 2d. Sect: Art. XI.

Mr. Govr. Morris opposed it for reasons urged by him on a former occasion—

Col: Mason contended strenuously for the motion. There was no weight he said in the argument drawn from changes in the value of the metals, because this might be provided for by an increase of salaries so made as not to affect persons in office, and this was the only argument on which much stress seemed to have been laid.

Genl. Pinkney. The importance of the Judiciary will require *men of the first talents: large salaries will therefore be necessary*, larger than the U.S. can allow in the first instance. He was not satisfied with the expedient mentioned by Col: Mason. He did not think it would have a good effect or a good appearance, for new Judges to come in with higher salaries than the old ones.

Mr Govr Morris said the expedient might be evaded & therefore amounted to nothing. Judges might resign, & then be re-appointed to increased salaries.

On the question

N.H. no—Ct no. Pa no. Del. no—Md. divd Va ay—S.C. no—Geo. abst. [also Masts—N.J. & N—C—] [Ayes—1; noes—5; divided—1; absent—4.]

Mr. Randolph & Mr. Madison then moved to add the following words to sect 2, art XI, “nor increased by any Act of the Legislature which shall operate before the expiration of three years after the passing thereof”

On this question

N.H. no. Ct. no—Pa. no. Del. no. Md ay— Va ay—S. C. no Geo—abst [also Mas. N.J. & N.C.] [Ayes—2; noes—5; absent—4.]

This history suggests the following:

Madison, seeking to eliminate *all* possible dependence by the judiciary on Congress, and proposing that Article III, Section 1, prohibit Congress from either increasing or decreasing judges’ salaries, had to meet the problem of inflation. Franklin immediately raised this issue, arguing that Madison’s proposal to forbid increases would not allow nominal increases necessary to keep pace with an increased cost of living. Not so, Madison replied. Rather the “variations in the value of money may be guarded against by taking for a standard wheat or some other thing of permanent value.” See 2 Farrand, *The Records of the Federal Convention of 1787*, 44-45, 429-30 (1966). Having said this, Madison introduced and rein-

roduced his proposal, which did not speak of wheat, but simply used the word "compensation." Since Madison knew the importance of protecting judges against inflation, since he wished to do so, and since he thought his clause forbidding increases and decreases did so, he must have thought that the language he proposed—"compensation"—meant "real" compensation. Otherwise, it could not have achieved his objective.

**APPENDIX D**

*In the United States Court of Claims*

(Decided May 18, 1977)

---

No. 41-76

C. CLYDE ATKINS, ET AL. v. THE UNITED STATES

No. 132-76

LOUIS C. BECHTLE, ET AL. v. THE UNITED STATES

No. 357-76

RUGGERO J. ALDISERT, ET AL. v. THE UNITED STATES

---

*Arthur J. Goldberg*, attorney of record for plaintiffs. *Stephen G. Breyer* and *Kevin M. Forde*, of counsel.

*Assistant Attorney General Rex E. Lee*, for defendant. *James F. Merow* and *Richard J. Webber*, of counsel.

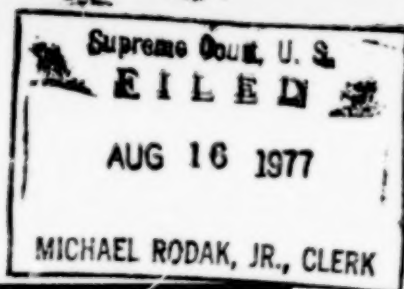
*Cornelius B. Kennedy* filed a brief for *Nelson A. Rockefeller*, President of the United States Senate, as *amicus curiae*. *Kennedy*, *Webster & Gardner*, of counsel.

*Eugene Gressman* filed a brief for *Frank Thompson, Jr.*, Chairman, Committee on House Administration, United States House of Representatives, as *amicus curiae*. *Arthur S. Miller*, of counsel.

*Francis M. Wheat* filed a brief for Los Angeles County Bar Association as *amicus curiae*. *John J. Quinn, Jr.*, *Samuel L. Williams*, *John D. Taylor*, *David Ellwanger*, and *Brigitta Troy*, of counsel.

---

No. 77-214



In the  
**Supreme Court of the United States**

OCTOBER TERM, 1977

---

---

C. CLYDE ATKINS, et al.,

*Plaintiffs,*

*vs.*

UNITED STATES OF AMERICA

*Defendant.*

---

---

**SUPPLEMENT TO PETITION FOR WRIT  
OF CERTIORARI TO THE UNITED STATES  
COURT OF CLAIMS**

---

ARTHUR J. GOLDBERG  
1101 17th Street N.W.  
Suite 1100  
Washington, D.C. 20036

Of Counsel

STEPHEN G. BREYER  
1545 Massachusetts Avenue  
Cambridge, Massachusetts

KEVIN M. FORDE  
RICHARD J. PRENDERGAST  
111 W. Washington Street  
Chicago, Illinois

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

No. 77-214

---

---

C. CLYDE ATKINS, et al.,

*Plaintiffs,*

*vs.*

UNITED STATES OF AMERICA

*Defendant.*

---

---

**SUPPLEMENT TO PETITION FOR WRIT  
OF CERTIORARI TO THE UNITED STATES  
COURT OF CLAIMS**

---

Petitioners respectfully submit this Supplement to their Petition for Writ of Certiorari, to advise the Court that since the filing of our Petition, the United States Court of Appeals for the Fourth Circuit, on July 26, 1977, decided *McCorkle v. United States*, (No. 76-1479) a case referred to in our Petition as pending<sup>1</sup> (See the Petition for Writ of Certiorari, p. 12, n. 20). We deem it appropriate to call this decision to the attention of the Court, since the decision addresses the question of whether 2 U.S.C. §359 (1)(B) is severable from the remainder of the Postal Rev-

---

<sup>1</sup> The *McCorkle* Opinion is submitted as an Appendix to this Supplement.

enue and Federal Salary Act of 1967, and decides that issue apparently contrary to the position taken by petitioners in this cause, and in conflict with the decision of the entire (dissent and, we believe, majority) Court of Claims in this case.<sup>3</sup> Thus, if we are correct in our analysis of the Court of Claims Opinions, this case presents a conflict between the Court of Appeals for the Fourth Circuit and the United States Court of Claims on this question, related to the "important and recurring" issue of the constitutionality of the one-house veto. As a further supplement to their Petition for Writ of Certiorari, petitioners also respectfully submit their views and comments on the *McCorkle* decision.

The *McCorkle* case was brought on behalf of federal government employees whose salaries are determined by the pay rates for Grades 15 through 18 of the General Schedule. In addition to certain equal protection arguments not pertinent to this cause, *McCorkle* contends that the one-house veto in 2 U.S.C. §359(1)(B) is unconstitutional, that the pay scale of executive level employees should therefore have been increased in 1974, and that the pay rates of those in the *McCorkle* class (GS-15

---

<sup>3</sup> As is noted in the Petition for Writ of Certiorari, three Court of Claims judges specifically found Clause B severable. The remaining four judges held that Clause constitutional without discussing severability. Since a holding of non-severability would have avoided the constitutional question presented, the fact that the majority of the Court of Claims decided that question indicates that they believed Clause B to be severable. See Petition, p. 17, n. 30.

<sup>4</sup> See Brief of the Solicitor General, *Clark v. Kimmit*, 75-1105 (October Term 1976.) See also, Petition for Writ of Certiorari in this case (hereinafter referred to as "Petition") at pp. 6-11.

through GS-18 federal employees) would have been increased had the salaries of executive level employees been increased. It should be emphasized that the salaries of *McCorkle* and other GS-15 through GS-18 employees have never been subject to or determined under the provisions of §359. His contention is that, if the salaries of executive level employees who are subject to §359 had been increased (as petitioners in this case contend) the statutory ceiling on *McCorkle*'s pay would have been removed, thus making GS-15 through 18 employees eligible for cost-of-living increases received by other General Schedule employees.

The Fourth Circuit viewed the *McCorkle* claim as principally seeking declaratory relief, and denied that relief particularly because the provision sought to be declared unconstitutional has subsequently been amended. (See Petition in this case, p. 15, n. 27.)

With respect to the one-house veto question, it should be noted that although the plaintiffs in *McCorkle* challenged the constitutionality of Section 359(1)(B), the Fourth Circuit did not decide that issue.<sup>4</sup> Rather, the Court held Section 359(1)(B) not severable from the remainder of the statute and affirmed the dismissal of the complaint on the ground that, in view of the finding of non-severability, "*McCorkle* cannot recover damages even if it [Section 359(1)(B)] is, as he contends, uncon-

---

<sup>4</sup> Although the Court did not reach this constitutional question, it did deny the equal protection argument raised by *McCorkle*, an issue not raised here except that petitioners have alleged discrimination in that Congress discriminated against judges as opposed to almost all other federal employees. The Court of Claims accepted, in principle, petitioners' discrimination contention, but rejected the application under the facts of this case—a conclusion with which we disagree.

stitutional.” (App. 6a) It should be noted that the Fourth Circuit in *McCorkle* observed that, in the context of that case, “[t]he pay system does not touch any fundamental right.” But this observation clearly does not pertain in the instant case. There is no constitutional inhibition against diminishment of the salaries of the civil servants represented by plaintiff McCorkle, nor do the same policy reasons [independence] which prohibit diminution of judges salaries apply to them. As noted in our Petition, (p. 29) high ranking government officials may be changed within limited circumstances with a change in Administration. But, the Constitution contains provisions designed to protect the tenure and compensation of judges in order to preserve their independence. Thus, the comment of the *McCorkle* Court to the effect that the pay system does not touch fundamental rights of those employees cannot be applied to judges.

The Petition for Writ of Certiorari succinctly states petitioners’ position with respect to the severability issue (pp. 17 through 20). It should be noted, however, that petitioners agree with the *McCorkle* Court regarding the applicable standard for determining the severability of a statutory provision from the remainder of a statute. That standard was set forth by this Court in *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932):

“Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”

Although the *McCorkle* Court cited and relied upon *Champlin*, the Court did not refer to subsequent decisions

of this Court which have applied the *Champlin* standard in holding that certain statutory provisions were severable from the statutes under consideration,<sup>5</sup> decisions which petitioners submit support their contention that Section 359(1)(B) is severable from the remainder of the Act.

Essentially, the *McCorkle* Court grounded its holding on its interpretation of the legislative history of the Postal Revenue and Federal Salary Act of 1967. The opinion, however, discusses only minor and selected portions of the legislative history of that statute and, it is respectfully submitted, fails adequately to present the Act’s legislative history, as a whole.

An examination of the legislative history of the Act is set forth at pages 18 and 19 of the Petition for Writ of Certiorari and at pages 23 *et seq.* of the Reply Brief filed by petitioners in the Court of Claims.<sup>6</sup> In petitioners’ view, the relevant legislative history, viewed as a whole, establishes that it is far from “evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not . . .” in the context of the Postal Revenue and Federal Salary Act of 1967.

Of particular significance is the fact that the Fourth Circuit failed to recognize that §359(1)(B) is not simply a part of the statutory provision that empowers the Presi-

<sup>5</sup> See e.g. *Tilton v. Richardson*, 403 U.S. 672, 683-84 (1970); *United States v. Jackson*, 390 U.S. 1 (1976). For a general discussion of the subject, see Stern, “Separability and Separability Clauses in the Supreme Court,” 51 *Harv. L. Rev.*, 76 (1973).

<sup>6</sup> “Plaintiffs’ Reply To Defendants’ Response To Plaintiffs’ Motion For Summary Judgment”.

dent to make binding salary recommendations<sup>7</sup>; it is, in fact, a provision of Public Law 90-206, the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 613, *et seq.* The provisions which empowered the President to establish salary levels do not constitute a separate Act of Congress, but rather a small portion of a much larger Act which, among other things, established postal rates and salaries for postal employees. Thus, if the one-house veto is unconstitutional (an issue not reached by the *McCorkle* court) and if Section 359(1)(B) is held to be inseverable, the entire Act must be voided, a result which would cause utter chaos with respect to postal rates charged and salaries received under the Postal Revenue and Federal Salary Act of 1967 during the past 10 years, and a consequence which the dissenting judges in the Court of Claims deemed "ludicrous" (Ct. of Cl. Op. p. 92), a characterization with which the majority of the Court must have agreed, or they, as the Fourth Circuit in *McCorkle*, would have avoided the constitutional question. (See note 2, *supra*)

For these reasons, and on the basis of the arguments set forth in the briefs filed with the Court of Claims and those set forth in the Petition for Writ of Certiorari on file in this cause, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ARTHUR J. GOLDBERG

---

<sup>7</sup> As stated by that Court: "Thus, Section 359(1)(B) creating the veto is *inseparable from those parts* of the statute that empower the President to make potentially binding recommendations." (App. 9a) [Emphasis supplied]

APPENDIX

---

UNITED STATES COURT OF APPEALS  
For The Fourth Circuit

---

No. 76-1479

---

William C. McCorkle, Jr., on behalf of himself  
and all others similarly situated,

*Appellant,*

v.

The United States, Robert E. Hampton,  
Chairman, U. S. Civil Service Commission,  
James T. Lynn, Director, Office of  
Management & Budget,

*Appellees.*

---

Appeal from the United States District Court for the  
Eastern District of Virginia, at Alexandria.

ALBERT V. BRYAN, JR., *District Judge.*

---

Argued December 7, 1976

Decided July 26, 1977

---

Before TOM C. CLARK,\* Associate Justice, retired, sitting  
by designation, and BUTZNER and WIDENER, *Circuit Judges.*

---

Lewis T. Booker (Rand A. Mirante, Johnnie M. Walters,  
Hunton and Williams on brief) for appellants; James R.  
Hubbard, Assistant United States Attorney (William B.  
Cummings, United States Attorney on brief) for appellees.

---

\* Mr. Justice Clark died before this opinion was prepared.

BUTZNER, *Circuit Judge*:

William C. McCorkle, on behalf of federal government employees whose salaries are determined by the pay rates for grades 15 to 18 of the General Schedule, appeals the judgment of the district court upholding the constitutionality of § 3(a) of the Federal Pay Comparability Act of 1970 [5 U.S.C. § 5308] and § 225(i)(1)(B) of the Federal Salary Act of 1967 [2 U.S.C. § 359(1)(B)]. McCorkle contends that limiting the pay of General Schedule employees to an amount no higher than the salaries of Executive Schedule employees denies his class equal protection of the law in violation of the due process clause of the fifth amendment. He also contends that authorizing one house of Congress to veto the President's recommendations for Executive Schedule salaries is prohibited by the constitutional provisions for bicameral legislation, the presidential veto, and the separation of powers. He seeks a declaratory judgment that 5 U.S.C. § 5308 and 2 U.S.C. § 359(1)(B) are unconstitutional and that he and each member of his class are entitled to recover damages. For reasons that differ in some respects from those assigned by the district court, we affirm the dismissal of McCorkle's complaint.

I.

The General Schedule establishes the basic pay system for most federal civilian, white collar employees. It contains 18 grades based upon degrees of responsibility and qualification. The Federal Pay Comparability Act authorizes the President to adjust salaries annually in accordance with the congressional policy set forth in §§ 5301<sup>1</sup> and 5308.

<sup>1</sup> 5 U.S.C. § 5301 provides in part:

(a) It is the policy of Congress that Federal pay fixing for employees under statutory pay systems be based on the principles that—

- (1) there be equal pay for substantially equal work;
- (2) pay distinctions be maintained in keeping with work and performance distinctions;

The target of McCorkle's complaint is § 5308 which provides:

Pay may not be paid, by reason of any provision of this subchapter, at a rate in excess of the rate of basic pay for level V of the Executive Schedule.

Thus, § 5308 imposes on McCorkle and his class a ceiling on their pay equivalent to the salary for a level V executive, the lowest of five grades in the Executive Schedule.

The Federal Salary Act authorizes the President to recommend adjustments in executive pay, including level V, every four years. Title 2 U.S.C. § 539 provides that these recommendations become effective unless the House and Senate enact different pay rates or either house disapproves of the recommendations.<sup>2</sup> In March, 1974, the

<sup>1</sup> (Continued)

(3) Federal pay rates be comparable with private enterprise pay rates for the same levels of work; and

(4) pay levels for the statutory pay systems be interrelated.

(b) The pay rates of each statutory pay system shall be fixed and adjusted in accordance with the principles under subsection (a) of this section and the provisions of [section] . . . 5308 of this title.

<sup>2</sup> 2 U.S.C. § 359(1) provides in part:

[A]ll or part (as the case may be) of the recommendations of the President transmitted to the Congress in the budget under section 358 of this title shall become effective at the beginning of the first pay period which begins after the thirtieth day following the transmittal of such recommendations in the budget; but only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—

(A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations,

(B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations, or

(C) both.

Senate rejected the President's recommendation for an increase in the pay rate for level V executives.<sup>2</sup> Because of the ceiling set by the Federal Pay Comparability Act, 5 U.S.C. § 5308, and the Senate disapproval of the President's proposal, the top salaries for General Schedule employees remained at the rate previously set for level V. It is this pay freeze that McCorkle attacks as discriminatory.

McCorkle contends that § 5308 denies him equal protection of the law because the ceiling it imposes on some General Schedule pay rates is not rationally related to a legitimate legislative purpose. He claims that all General Schedule employees, including those in grades 15 to 18, are entitled to salaries determined by the principles in § 5301. He asserts that § 5308 invidiously discriminates between employees whose salaries have been increased annually because they are less than the level V ceiling and those whose salaries are frozen by the ceiling.

Since the pay system does not touch any fundamental right nor create a suspect classification, the statute complies with the equal protection component of the due process clause, as long as it rationally furthers legitimate, governmental purposes. *Cf. Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976); *see Buckley v. Valeo*, 424 U.S. 1, 93 (1976). To assess the rationality of the classification of employees created by the statute, we must examine its purpose in the context of the federal pay system for both General Schedule and Executive Schedule employees.

In establishing the policy governing the General and Executive Schedules, Congress intended that pay be commensurate with responsibility and that the relationship between salary schedules be appropriate. If General Schedule salaries exceeded compensation for federal executives, some employees would earn more money than others with greater responsibility. Also, some General Schedule

<sup>2</sup> S. Res. 293, 93rd Cong., 2d Sess., 120 Cong. Rec. 5508 (1974).

employees would earn more than their bosses. Consequently, the ceiling on General Schedule salaries rationally furthers the congressional purpose of establishing a logical relationship between pay and responsibility. *Cf. Dandridge v. Williams*, 397 U.S. 471 (1970).

Moreover, Congress determined that the pay rates for top level and lower level General Schedule employees involve different considerations. Explaining a similar ceiling on General Schedule salaries imposed by the Federal Salary Act of 1967, the Senate Report stated:

There is an unrealistic ceiling on Federal salaries at the highest levels which reflects the national sentiment that officers with great responsibility in the Government are bound as good citizens to make some personal financial sacrifice for their country and their Government while serving in appointive positions. But below that high level, career employees must be paid as well as if they worked in private enterprise. There is a direct and proved relationship between adequate pay and the willingness of any employee anywhere to do his best. The Government would be saving nothing and losing much if it did not recognize and follow this principle of equal pay for equal work for Federal employees<sup>4</sup>

As Congress has subsequently acknowledged, the pay structure established by the Federal Pay Comparability Act does not entirely meet its objectives, because the compression of salaries at the General Schedule ceiling affects career incentive and morale.<sup>5</sup> The fifth amendment, however, does not require Congress to develop a perfect pay system. The ceiling imposed by § 5308 bears a reasonable relationship to Congress's objective of balancing fiscal responsibility with employee needs. Since it justifiably furthers legitimate purposes identified by Congress, § 5308

<sup>4</sup> S. Rep. No. 801, 90th Cong., 1st Sess. 24, reprinted in [1967] U.S. Code Cong. & Ad. News 2258, 2281.

<sup>5</sup> S. Rep. No. 94-333, 94th Cong., 1st Sess. 4-8, reprinted in [1975] U.S. Code Cong. & Ad. News 845, 848-852.

does not deny McCorkle and his fellow employees equal protection of the law. Cf. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); *Wisconsin National Organization for Women v. Wisconsin*, 417 F.Supp. 978, 986 (W. D. Wis. 1976); *Bruce v. Searce*, 390 F.Supp. 297, 300-01 (E. D. Mo.), *aff'd* 521 F.2d 796 (8th Cir. 1975).

### III.

McCorkle also contends that the one-house veto of the President's recommendations for Executive Schedule salaries as provided in the Federal Salary Act, 2 U.S.C. § 359(1)(B)<sup>6</sup>, is an unconstitutional delegation of legislative authority.<sup>7</sup> He claims that if the Senate had not acted unconstitutionally to disapprove the President's recommendations, the new rates of executive pay would have gone into effect automatically. This would have raised the level V ceiling and consequently increased his own pay.

The difficulty with McCorkle's position is his assumption that Congress would have enacted the Federal Salary Act without the provision for the legislative veto set forth in § 359(1)(B). This raises the question of the separability of this provision from the Act. Unless it is separable, McCorkle cannot recover damages even if it is, as he contends, unconstitutional. Lacking separability, the provisions for the President's recommendations would be deemed inoperative. 2 C. D. Sands, *Statutes and Statutory Construction*, §§ 44.03, 44.06 (4th ed. 1973). The canons of constitutional litigation dictate that we initially consider the statutory issue of separability before we turn to the question of constitutionality. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring).

<sup>6</sup> See *supra* note 2.

<sup>7</sup> In *Atkins v. United States*, Nos. 41-76, 132-76, 357-76 (Ct. Cl., May 18, 1977), the court upheld the constitutionality of § 359(1)(B). The dissenting opinion maintained that this part of the statute was unconstitutional and severable from the rest of the Act.

In *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932), the Court stated that the separability of a statute should be determined by the following standard:

Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent. See *Davis v. Wallace*, 257 U.S. 478, 484 (1922); 2 C. D. Sands, *Statutes and Statutory Construction*, § 44.13 (4th ed. 1973).

Applying these rules of statutory construction to the Federal Salary Act of 1967, we conclude that the President's power to fix salaries is not separable from the restriction on this power embodied in the one-house veto. The Act provides that the President's recommendations for Executive Schedule salaries shall be effective unless (A) Congress enacts a statute which establishes different pay rates, or (B) either house disapproves of the recommendations.<sup>8</sup> Thus, the effectiveness of the President's recommendations depends on the acquiescence of both houses. The legislative history demonstrates that Congress would not have granted the President the power to set congressional, executive, and judicial salaries without this restriction.

The proposal for establishing salaries by presidential recommendation was vigorously debated by Congress because some members feared that it delegated to the President excessive authority over federal pay. In the House, Representative Gross offered an amendment to strike the provisions authorizing the President to make potentially binding recommendations. Representative

<sup>8</sup> See *supra* note 2.

Udall, the House floor manager, defended the bill by repeatedly emphasizing that Congress could veto the President's suggestions. He said that if the President's recommendation were arbitrary, "it would be vetoed by this House with 5 minutes of debate. . . ." 113 Cong. Rec. 28643 (1967).

The bill passed the House with the provision that the President's recommendations would become effective unless Congress disapproved of them or enacted pay legislation. The Senate, however, refused to authorize the President "to establish, affirmatively or negatively, the salaries of the Members of Congress" on the ground that allowing the President's recommendations to take effect in the manner provided by the House abdicated Congress's constitutional responsibility.\* Following a conference, the Senate passed a compromise bill which essentially followed the House version. It acted only after considering assurances that either House could veto the President's recommendations. Senator Monroney, the Senate floor manager, explained:

If the [Senate] does not like [the salaries recommended by the President], a majority of one in either body can veto that plan and Congress can fix those salaries legislatively. We have not surrendered any power. We have the right to exercise the power whenever such plan does not meet the consensus of the majority of one in either house.

. . . .  
. . . Either House, by a majority of one, can reject or modify the plan. So the power rests with the congressional branch. 113 Cong. Rec. 36108 (1967).

Voiding the one-house veto as unconstitutional while leaving presidential authority intact would increase the President's power over salaries far beyond the intention of Congress. We are satisfied that the legislative history establishes that Congress would not have delegated au-

\* S. Rep. No. 801, 90th Cong., 1st Sess. 25, reprinted in [1967] U.S. Code Cong. & Ad. News 2258, 2282.

thority to the President to establish salaries without the provision for the one-house veto. Thus, § 359(1)(B) creating the veto is inseparable from those parts of the statute that empower the President to make potentially binding recommendations. If the veto were unconstitutional, as McCorkle contends, the provisions for the President's recommendations to become effective could not stand in isolation. Accordingly, McCorkle would not be entitled to damages based on these recommendations.

#### IV.

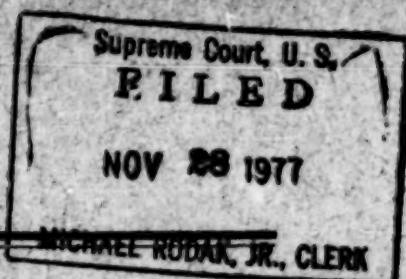
We also conclude that McCorkle is not entitled to a judgment declaring whether § 359(1)(B) is constitutional. An important question of public law should not be resolved by a declaratory judgment if that judgment would be futile. The court should be able to see "what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 244 (1952); see E. Borchard, *Declaratory Judgments* 299 (2d ed. 1941); C. Wright & A. Miller, *Federal Practice and Procedure*, §§ 2759, 2763 (1973).

As explained in Part III, McCorkle could not recover damages even if he prevailed on his contention that § 359(1)(B) is unconstitutional. Moreover, while this appeal was pending, Congress amended § 359(1)(B) to provide that the President's recommendations shall become effective only if both houses of Congress approve.<sup>10</sup> Because the statute no longer provides for a one-house veto, a declaratory judgment concerning the constitutionality of this legislative check on executive action would not affect the procedure used to determine McCorkle's future pay. We therefore conclude that a declaratory judgment should be denied because it would not serve a useful purpose in settling the controversy.

*Affirmed.*

<sup>10</sup> Act of April 12, 1977, Pub. L. No. 95-19, § 401, 91 Stat. 39.

No. 77-214



**In the Supreme Court of the United States**  
**OCTOBER TERM, 1977**

---

**C. CLYDE ATKINS, ET AL., PETITIONERS**

*v.*

**UNITED STATES OF AMERICA**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF CLAIMS**

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**KEITH A. JONES,**  
*Acting Solicitor General,*  
**BARBARA ALLEN BABCOCK**  
*Assistant Attorney General,*  
**LEONARD SCHAITMAN,**  
**ANTHONY J. STEINMEYER,**  
*Attorneys,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

---

## INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Questions presented .....	2
Constitutional provisions and statutes involved..	2
Statement .....	3
Argument .....	9
Conclusion .....	21

## CITATIONS

### Cases:

<i>Buckley v. Valeo</i> , 424 U.S. 1 .....	16
<i>Champlin Refining Co. v. Corporation Commission of Oklahoma</i> , 286 U.S. 210 .....	18
<i>Clark v. Valeo</i> , 553 F. 2d 642, affirmed sub nom. <i>Clark v. Kimmet</i> , No. 76- 1105 (June 6, 1977) .....	16
<i>Davis v. Wallace</i> , 275 U.S. 478 .....	
<i>Evans v. Gore</i> , 253 U.S. 245 .....	13
<i>McCorkle v. United States</i> , 559 F. 2d 1258, petition for certiorari filed Sep- tember 28, 1977 (No. 77-486) .....	9, 16, 18
<i>Miles v. Graham</i> , 268 U.S. 501 .....	13
<i>O'Malley v. Woodrough</i> , 307 U.S. 277 .....	12
<i>Judges' Case</i> , 8 Va. (4 Call) 135 .....	12, 13
<i>United States v. Testan</i> , 424 U.S. 392 .....	7

## II

Constitution and statutes:	Page
United States Constitution:	
Article I .....	17
Article I, Section 1 .....	2, 6, 16
Article I, Section 7 .....	2, 6, 8, 16
Article II .....	6, 8, 17
Article II, Section 1 .....	2, 6
Article III .....	17
Article III, Section 1 .....	2
Act of June 30, 1932, Section 407, 47 Stat. 414 .....	15
Executive Salary Cost-of Living Adjustment Act, 89 Stat. 421 .....	5
Immigration and Naturalization Act, 66 Stat. 241, as amended, 8 U.S.C. 1254 (c) (2) .....	16
Postal Revenue and Federal Salary Act of 1967, Section 225, 81 Stat. 642, 2 U.S.C. (1970 ed. and Supp. V) 351 <i>et seq.</i> .....	2, 3
2 U.S.C. 352 .....	3
2 U.S.C. (and Supp. V) 356 .....	3
2 U.S.C. (and Supp. V) 357 .....	3
2 U.S.C. 358 .....	4
2 U.S.C. (1970 ed.) 359 .....	2
2 U.S.C. (1970 ed.) 359(1) (A) .....	4
2 U.S.C. (1970 ed.) 359(1) (B) .....	4, 6, 7, 15, 16, 17
Tucker Act, 28 U.S.C. 1491 .....	6
Pub. L. 95-19, 91 Stat. 45 .....	6
1 Stat. 72 .....	11
5 U.S.C. 906(a) .....	15

## III

Constitution and statutes—Continued	Page
5 U.S.C. 5308 .....	14
28 U.S.C. (1964 ed.) 44(d) .....	3
28 U.S.C. (1964 ed.) 135 .....	3
Miscellaneous:	
113 Cong. Rec. 28642-28643 (1967) .....	19
113 Cong. Rec. 28644 (1967) .....	19
113 Cong. Rec. 35839 (1967) .....	20
113 Cong. Rec. 36108 (1967) .....	19
115 Cong. Rec. D40 (1969) .....	4
115 Cong. Rec. 2677-2716 (1969) .....	4
115 Cong. Rec. 2690 (1969) .....	4
120 Cong. Rec. 5111 (1974) .....	5
120 Cong. Rec. 5492-5508 (1974) .....	5, 14
122 Cong. Rec. H10666-H10690 (daily ed., September 21, 1976) .....	15
122 Cong. Rec. H10718-H10719 (daily ed., September 21, 1976) .....	15
Department of Labor, Bureau of Labor Statistics, <i>Monthly Labor Review</i> 77 (September 1977) .....	10
Exec. Order No. 11474, 34 Fed. Reg. 9605 (1969) .....	14
Exec. Order No. 11883, 40 Fed. Reg. 47091 (1975) .....	14
2 Farrand, <i>The Records of the Federal Convention of 1787</i> (1966) .....	11
34 Fed. Reg. 2241 (1969) .....	4
34 Fed. Reg. 2242 (1969) .....	4
40 Fed. Reg. 47099 (1975) .....	5, 14
42 Fed. Reg. 10297 (1977) .....	6
H.R. Rep. No. 93-870, 93d Cong., 2d Sess. (1974) .....	5

Miscellaneous—Continued	Page
H.R. Rep. No. 12048, 94th Cong., 2d Sess. (1976) .....	15
H.R. Res. 133, 91st Cong., 1st Sess. (1969) .....	4
H.R. Res. 807, 93d Cong., 2d Sess. (1974) .....	5
S. Rep. No. 801, 90th Cong., 1st Sess. (1967) .....	19
S. Rep. No. 93-701, 93d Cong., 2d Sess. (1974) .....	14
S. Res. 82, 91st Cong., 1st Sess. (1969) .....	4
<i>The Federalist</i> No. 79, pp. 497-498 (Wright ed., 1961) .....	11
13 Weekly Comp. of Pres. Docs. 1128-1129 (July 28 and August 5, 1977) .....	16
Bruff and Gellhorn, <i>Congressional Control of Administrative Regulation: A Study of Legislative Vetoes</i> , 90 Harv. L. Rev. 1396 (1977) .....	17
Watson, <i>Congress Steps Out: A Look at Congressional Control of the Executive</i> , 63 Calif. L. Rev. 983 (1975) .....	15

## In the Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 77-214

C. CLYDE ATKINS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF CLAIMS

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

OPINION BELOW

The opinion of the Court of Claims (Pet. App. D) is reported at 556 F. 2d 1028.

### JURISDICTION

The judgment of the Court of Claims was entered on May 18, 1977. The petition was filed on August 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

(1)

### QUESTIONS PRESENTED

1. Whether Article III, Section 1, of the Constitution, which provides that federal judges shall receive "a Compensation, which shall not be diminished during their Continuance in Office," requires Congress to increase judicial salaries during periods of inflation.

2. Whether 2 U.S.C. (1970 ed.) 359(1)(B), which until its repeal in 1977 authorized a single House of Congress to disapprove salary changes recommended by the President for certain judicial, legislative, and executive officials, violated the law-making procedures established by Article I, Sections 1 and 7, of the Constitution or otherwise violated the separation of powers established by Articles I, II, and III of the Constitution.

3. Whether 2 U.S.C. (1970 ed.) 359(1)(B) was severable from the remainder of the salary adjustment provisions of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. 351 *et seq.*

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Sections 1 and 7, Article II, Section 1, and Article III, Section 1, of the Constitution and pertinent portions of Section 225 of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. (1970 ed.) 351 *et seq.*, are set forth at Pet. App. 1a-4a.

### STATEMENT

Petitioners are 130 federal circuit and district court judges who brought this action for additional compensation allegedly due them for services since March 15, 1969 (Pet. 3). On that date the salary of circuit judges had been increased 28.8 percent from \$33,000 to \$42,500, and the salary of district judges had been increased 33 1/3 percent from \$30,000 to \$40,000. 28 U.S.C. (1964 ed.) 44(d), 135; 2 U.S.C. 358 note.

This increase was the first pay adjustment made pursuant to Section 225 of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. 351 *et seq.* ("Salary Act"). The Salary Act established a Commission on Executive, Legislative, and Judicial Salaries composed of nine members,<sup>1</sup> which recommends to the President, once every four years, specific pay rates for federal judges, Congressmen, the Vice President, Cabinet officers, and certain other officials in the Legislative, Executive, and Judicial Branches. 2 U.S.C. (and Supp. V) 356, 357. The Act requires the President, after receiving the Commissions report, to include in the next budget he submits to Congress "his recommendations with respect to the exact rates of pay which he deems advisable, for [specified] offices and positions within the pur-

<sup>1</sup> Three members of the Commission are appointed by the President, and two members each are appointed by the President of the Senate, the Speaker of the House, and the Chief Justice. 2 U.S.C. 352.

view of [the Salary Act]." 2 U.S.C. 358. During the period at issue in this suit, the rates of pay recommended by the President would become effective for the first pay period beginning thirty days after submission of the recommendations, or on a later date specified by the President, unless (1) Congress enacted a statute providing for rates of pay other than those the President has proposed (2 U.S.C. (1970 ed.) 359(1)(A)) or (2) either House of Congress "enacted legislation which specifically disapproves all or part of such recommendations \* \* \*." 2 U.S.C. (1970 ed.) 359(1)(B).

In its first quadrennial report to the President in December 1968, the Commission recommended, *inter alia*, that the salary of circuit judges be increased from \$33,000 to \$50,000 and that the salary of district judges be increased from \$30,000 to \$47,500. 115 Cong. Rec. 2690 (1969). The President recommended somewhat lower salary increases to \$42,500 for circuit judges and \$40,000 for district judges. 34 Fed. Reg. 2241, 2242 (1969). Neither House disapproved the President's recommendations,<sup>2</sup> and they therefore became effective for the first pay period beginning after February 14, 1969. 34 Fed. Reg. 2241 (1969).

<sup>2</sup> The Senate debated extensively a resolution (S. Res. 82, 91st Cong., 1st Sess. (1969)) disapproving all of the pay raises the President had proposed, but it ultimately rejected the resolution by a vote of 47 to 34. 115 Cong. Rec. 2677-2716 (1969). A similar resolution was introduced in the House (H. R. Res. 133, 91st Cong., 1st Sess. (1969)) but was not reported out of committee. 115 Cong. Rec. D40 (1969).

In its second report to the President in June 1973, the Commission recommended increases of approximately 25 percent in legislative, executive, and judicial salaries that would have raised the salary of circuit judges to \$53,000 and that of district judges to \$50,000. 120 Cong. Rec. 5111 (1974). The President modified this recommendation to provide three annual increases of approximately 7.5 percent each, which by 1976 would have increased circuit judges' salaries to \$52,800 and district judges' salaries to \$49,700. See H.R. Rep. No. 93-870, 93d Cong., 2d Sess. 3 (1974). The Senate passed a resolution disapproving all of the salary adjustments the President had proposed. 120 Cong. Rec. 5492-5508 (1974).<sup>3</sup>

Salaries of federal judges and other officials have been increased twice since 1974. First, in 1975, pursuant to the Executive Salary Cost-of-Living Adjustment Act, 89 Stat. 421, judicial salaries were increased to \$44,600 for circuit judges and \$42,000 for district judges. 40 Fed. Reg. 47099 (1975). Second, judicial, legislative, and executive salaries were substantially increased effective the first pay period after February 20, 1977, following the Commission's third quadrennial report under the Salary Act. The President recommended salary in-

<sup>3</sup> A similar resolution disapproving the salary increases proposed by the President was introduced in the House (H.R. Res. 807, 93d Cong., 2d Sess. (1974)) and was reported out of committee. H.R. Rep. No. 93-870, *supra*. No further action was taken on the resolution, however, because of passage of the Senate resolution disapproving the proposed salary increases.

creases to \$57,500 (a 28.9 percent increase) for circuit judges and to \$54,500 (a 29.8 percent increase) for district judges (42 Fed. Reg. 10297 (1977)), and neither House disapproved the President's recommendations.

On April 12, 1977, the one-House veto provision of the Salary Act was eliminated by Pub. L. 95-19, 91 Stat. 45. The amended act requires both Houses to conduct separate votes upon each Presidential salary recommendation. Only if both Houses approve a recommendation can it become effective.

Petitioners filed the first of the three present consolidated actions in the Court of Claims on February 11, 1976. Invoking the court's jurisdiction under the Tucker Act, 28 U.S.C. 1491, petitioners sought money damages based upon two claims. First, petitioners alleged that the failure of the Legislative and Executive Branches to take action after March 15, 1969, to prevent the purchasing power of their salaries from being diminished by inflation violated Article III, Section 1, of the Constitution, which provides that federal judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office" (Pet. App. D, p. 2). Second, petitioners contended that the Senate's action disapproving the President's 1974 recommendation pursuant to 2 U.S.C. (1970 ed.) 359(1)(B) was an unconstitutional exercise of executive power reserved to the President by Article II and did not constitute enactment of legislation in accordance with Article I, Sections 1 and 7. The United States, represented by the Department

of Justice, opposed petitioners' claim under the Compensation Clause but agreed with petitioners' contention that 2 U.S.C. (1970 ed.) 359(1)(B) was invalid.<sup>4</sup> The United States contended, however, that the one-House veto provision was not severable from the remainder of the Salary Act and that petitioners therefore could not prevail on their statutory claim whether or not that provision was valid.

The Court of Claims dismissed petitioners' claim under the Compensation Clause.<sup>5</sup> All but one of the judges of the court concluded that that Clause protects against erosion of the purchasing power of judicial salaries only where congressional refusal to increase the dollar amount of the salaries is a discriminatory attack upon the independence of the judiciary (Pet. App. D, pp. 20-36).<sup>6</sup> The court found

---

<sup>4</sup> In view of the agreement of petitioners and the Department of Justice that the one-House veto provision was unconstitutional, the Court of Claims invited and received briefs from the Senate and House of Representatives as *amici curiae* supporting the constitutionality of that provision.

<sup>5</sup> As a threshold question, the court below held that the rule of necessity authorized and required the judges of the Court of Claims to decide the case despite their indirect interest in the controversy arising from the fact that their own salaries have been established in the same manner as petitioners' salaries (Pet. App. D, pp. 5-15). Previously, the Court of Claims had certified that question to this Court. In their briefs in this Court, both parties agreed that the judges of the court below were not disqualified. On June 21, 1976, this Court dismissed the certified question. 426 U.S. 944.

<sup>6</sup> Judge Nichols concurred on the ground that *United States v. Testan*, 424 U.S. 392, barred jurisdiction in the Court of Claims over petitioners' claim (Pet. App. D, pp. 73-80).

no such discriminatory attack in the present case, and it noted that the salary levels of top-level civil servants and members of Congress also had not been substantially increased during this inflationary period (Pet. App. D, p. 44).

A four-man majority of the Court of Claims also held that the one-House veto provision was constitutional and that the Senate's disapproval of the 1974 pay raise recommended by the President therefore was valid. The court concluded that the provision permitting one House to "enact legislation" disapproving any pay raises recommended by the President did not violate the principles of bicameralism and presidential participation in law-making set forth in Article I, Section 7, of the Constitution because, in the court's view, the statutory scheme of the Salary Act was not significantly different from a statute calling for the President to recommend new legislation increasing salaries that would not become effective in the event one House failed to approve it (Pet. App. D, pp. 55-63). The court also concluded that the one-House veto provision did not encroach upon executive powers under Article II or otherwise violate separation-of-powers principles (Pet. App. D, pp. 63-72).

Three judges dissented on the ground that in their view the one-House veto provision was unconstitutional, that it was severable from the remainder of the Salary Act, and that petitioners therefore were entitled to the difference between the salary levels recommended by the President in 1974 and the sal-

aries actually received from March 1974 to March 1977 (Pet. App. D, pp. 80-112).

### ARGUMENT

The Court of Claims correctly rejected petitioners' claim based upon the Compensation Clause, Article III, Section 1. Although we agree with petitioners and the dissenting judges below that the one-House veto provision of the Salary Act was unconstitutional, there is no occasion for the Court to reach that issue in this case. The legislative history of the Salary Act demonstrates that Congress did not intend to confer upon the President and the Commission final authority to change the salaries of federal judges, members of Congress, and top-level executive officials without subsequent veto power by either House of Congress. Accordingly, as the Fourth Circuit recently held in *McCorkle v. United States*, 559 F.2d 1258, petition for certiorari filed September 28, 1977 (No. 77-486), the one-House veto provision was not severable from the remainder of the pay adjustment provisions of the Salary Act, and petitioners therefore would not be entitled to the 1974 recommended salary increase regardless whether that provision was valid. Moreover, the one-House veto provision challenged here has been eliminated from the Salary Act.

1. The Court of Claims correctly rejected petitioners' claim that the failure to increase their salaries

by more than 5 percent between 1969 and 1976 violates the Compensation Clause.

Petitioners contend that the constitutional requirement that judges receive "a Compensation, which shall not be diminished during their Continuance in Office" does not protect merely the dollar amount of their salaries but also "offers *some* protection for a judge's real compensation," *i.e.*, the purchasing power of that salary as measured by the Consumer Price Index (Pet. 21; emphasis in original).<sup>7</sup> The history of the Compensation Clause, however, plainly shows that the Founders used "Compensation" in its ordinary sense, *i.e.*, salary payable in legal tender, not in the manner petitioners urge. Indeed, during the Con-

---

<sup>7</sup> Petitioners do not argue, however, that judicial salaries must be adjusted "with every jog in the Consumer Price Index," but only that their salaries must be adjusted "from time to time so that there is no serious decline over a period of years" and so that adjustments in governmental salaries do not discriminate against judges (Pet. 25-26). Such a standard would present substantial difficulties to courts in selecting, *inter alia*, the appropriate basis from which and period during which to measure the adequacy of adjustments in judicial salaries. For example, petitioners have selected the period from March 1969 (immediately after the 1969 salary increase) to early 1976 (before the 1977 salary increase) (Pet. 3). During this period the CPI rose more than 52 percent while judicial salaries rose less than 5 percent. A far different comparison emerges if the relevant period is extended from February 1969 to March 1977. During this period, the salary of district judges increased 81.7 percent (from \$30,000 to \$54,500) and the salary of circuit judges increased 74.2 percent (from \$33,000 to \$57,500), while the CPI increased 66.4 percent. See Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review* 77 (September 1977).

stitutional Convention, Madison supported a proposal that would have prohibited increases, as well as decreases, in judicial compensation. 2 Farrand, *The Records of the Federal Convention of 1787* 44-45 (1966). To guard against "[t]he variations in the value of money," Madison suggested "taking for a standard wheat or some other thing of permanent value." *Id.* at 45. Although acutely conscious of the problem of inflation, the Convention twice rejected Madison's plan and adopted instead the present Compensation Clause, thus manifesting an intent to provide judges with compensation in its common and ordinary form, *i.e.*, a salary, measured in currency, which Congress can increase as "regulated by the manners [and] the style of living in [the] Country." *Id.* at 45; see also *id.* at 429-430.<sup>8</sup>

In explaining the Compensation Clause, Hamilton also indicated that the effect of inflation upon judicial salaries was a matter to be resolved by legislative discretion, not by a self-executing constitutional command (*The Federalist* No. 79, pp. 497-498 (Wright ed., 1961)):

It will readily be understood that the fluctuations in the value of money and in the state of society

---

<sup>8</sup> The first judicial salary provision, 1 Stat. 72 (1789), also equated "compensation" with a monetary salary by providing, "That there shall be allowed to the judges of the Supreme and other courts of the United States, the yearly compensations herein after mentioned, to wit: to the Chief Justice four thousand dollars \* \* \*." No provision was made for cost-of-living adjustments or for periodic review of the adequacy of the salaries specified.

rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse.<sup>191</sup>

As decisions of this Court reflect, the purpose of the Compensation Clause was not to entitle judges to compensation free from the effects of inflation but to protect judges from attacks on their independence through discriminatory reductions of their salaries. Thus, in *O'Malley v. Woodrough*, 307 U.S. 277, this Court held that applying a general income tax to the incomes of judges did not violate the Compens-

---

<sup>191</sup> This view apparently was shared by the judges of the Virginia Court of Appeals, who in 1788 voiced their objection to a Virginia statute that purported to increase their duties substantially without any increase in remuneration. *Judges' Case*, 8 Va. (4 Call) 135. The judges considered the increase in duties to violate the state constitution, but they took a different view of payment of their salaries in inflated paper money (*id.* at 145):

The various substitutions of paper money and tobacco for specie, which was not to be had, the judges considered as temporary expedients, which, though operating greatly to the diminution of their salaries, were not designed to affect their independence, and therefore they acquiesced, content to share in the public calamities, in hopes of a recurrence to the constitutional principle in better times.

sation Clause. The Court reaffirmed the proposition, recognized in *Evans v. Gore*, 253 U.S. 245, and *Miles v. Graham*, 268 U.S. 501, that the purpose of the Compensation Clause was to protect the independence of the judiciary, but it overruled those decisions in so far as they held that the Clause prohibited Congress from imposing a non-discriminatory tax upon the incomes of judges. In *O'Malley*, the Court stated (307 U.S. at 282):

To subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government \* \* \*.

The court below correctly concluded that those principles foreclose petitioners' claims under the Compensation Clause. As the court stated (Pet. App. D, p. 29):

*O'Malley* rejected the contention that a diminution of purchasing power by virtue of income taxation violated the Compensation Clause, stating that an economic burden placed nondiscriminately on the public generally afforded judges no cause to complain under the Constitution. Inflation generally experienced by the public is just such a nondiscriminatory burden.

Congressional action with respect to judicial salaries fully supports the Court of Claims' conclusion that the delay in raising judicial salaries between 1969 and 1976 was nondiscriminatory with respect

to judges and cannot be regarded as an attack on the independence of the judiciary. First, there is no *a priori* basis for petitioners' selection of that particular period; if a slightly different period had been selected, judicial salary increases would have been shown to have exceeded the rate of inflation (see note 7, *supra*). Moreover, as the Court of Claims noted (Pet. App. D, pp. 41-47), judicial salaries have traditionally been linked to the amount Congress pays its own Members and top-level executive officials, and in 1974 Congress declined to increase such salaries.<sup>10</sup> Finally, the recent substantial salary increases under the Salary Act now provide petitioners compensation that they do not claim is inadequate, thus confirming that there has been no assault on judicial independence by means of salary actions.

<sup>10</sup> The legislative history of the Senate's disapproval of the recommended salary increases in 1974 provides no evidence of any hostility to the judiciary. See S. Rep. No. 93-701, 93d Cong., 2d Sess. (1974); 120 Cong. Rec. 5492-5508 (1974).

Petitioners argue that the refusal to increase judicial salaries was discriminatory because the salaries of GS 16 to 18 employees increased 48.9 percent between 1969 and 1976 (Pet. 27). In fact, however, the ceiling established by 5 U.S.C. 5308 caused marked differences in the increases for these employees. For example, between the July 1, 1969, pay raise and 1976, the salary of a GS 16, step 1, employee increased 45.1 percent, from \$25,044 to \$36,338, while the salary of a GS 18, step 1, employee increased only 12.9 percent, from \$33,495 to the \$37,800 ceiling. See Exec. Order No. 11474, 34 Fed. Reg. 9605 (1969); Exec. Order No. 11883, 40 Fed. Reg. 47091, 47092 (1975).

2. We concur with petitioners and the dissenting judges below (Pet. App. D, pp. 80-92) that the one-House veto provision of 2 U.S.C. (1970 ed.) 359(1) (B) was invalid. This provision was, before its repeal, one of a large number of similar provisions in federal legislation that purport to give both Houses, one House, or committees thereof, veto power over actions lawfully taken by the President pursuant to statute.<sup>11</sup> Such provisions have been opposed on constitutional grounds by every President since President Hoover,<sup>12</sup> and a clear judicial resolution of the con-

<sup>11</sup> See generally Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal. L. Rev. 983 (1975). While the first legislative veto provision of which we are aware was enacted in a 1932 executive reorganization statute, Act of June 30, 1932, Section 407, 47 Stat. 414, it is only in the last decade that such enactments have become relatively frequent. The most sweeping proposal introduced recently, which was defeated by a narrow margin, was a bill to amend the Administrative Procedure Act to provide that every agency regulation could go into effect only after being submitted to Congress and not disapproved by either House. H.R. 12048, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. H10666-H10690, H10718-H10719 (daily ed., September 21, 1976).

<sup>12</sup> See Watson, *supra*, 63 Cal. L. Rev. at 988, n. 9. In January, 1977 the present Attorney General expressed the opinion that the one-House veto provision contained in the executive reorganization statute, 5 U.S.C. 906(a), was constitutional, but his opinion was expressly limited to the unique nature of that statute. Unlike the situation presented under most statutes, including the Salary Act, a reorganization plan submitted by the President under that statute has no effect on any individual's legal rights or obligations, and a veto of such a plan by one House does not change the legal rights or status that any individual would have in the absence of that House's action. For that reason, it may be appropriate to

stitutional issue is of the utmost importance.<sup>13</sup>

In brief, we contend that 2 U.S.C. (1970 ed.) 359 (1)(B), which permitted a single House of Congress to change what otherwise would be legally effective through what purported to be legislation, violated the law-making procedures set forth in Article I, Sections 1 and 7, of the Constitution and the basic principles of bicameralism and the presidential role in legislation established by those constitutional provisions. Moreover, we submit that the majority of the court below erred in attempting to analogize the operation of a one-House veto under the Salary Act to a con-

---

conclude that a veto by one House is sufficiently equivalent to the ordinary situation in which one House refuses to pass legislation proposed by the President to survive constitutional challenge. Apart from that narrow exception, President Carter, like other Presidents, has expressed "serious constitutional reservations" and his "intention to preserve the constitutional authority of the President" with respect to such provisions. See 13 Weekly Comp. of Pres. Docs. 1128-1129, 1185-1186 (July 28 and August 5, 1977).

<sup>13</sup> The decision below is the only decision to date that squarely reaches the issue. Other decisions involving one-House veto provisions have declined on various grounds to reach the question of their constitutionality. See *Buckley v. Valeo*, 424 U.S. 1, 140 n. 176; *Clark v. Valeo*, 559 F.2d 642 (C.A. D.C.), affirmed *sub nom. Clark v. Kimmitt*, No. 76-1105 (June 6, 1977); *McCorkle v. United States*, *supra*. The issue of the constitutionality of a one-House veto in the Immigration and Nationality Act, 66 Stat. 214, as amended, 8 U.S.C. 1254(c) (2), is currently pending in *Chadha v. Immigration and Naturalization Service*, C.A. 9, No. 77-1702.

stitutionally permissible statutory scheme.<sup>14</sup> Such an analysis ignores the fact that the one-House veto provision, in reversing the law-making, law-executing order established by the Constitution, was not a change in form only but has a substantial and fundamental impact on the system of government envisioned by the Founders. See generally Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1396 (1977). Moreover, the statute at issue here and similar provisions have substantially encroached upon the constitutional functions of the President, and in many cases of the judiciary as well, in violation of the separation of powers inherent in Articles I, II, and III.

3. Notwithstanding the importance of the issue generally, there is no occasion for the Court to consider the validity of former 2 U.S.C. (1970 ed.) 359 (1)(B) in this case. We submit that the Fourth Circuit in *McCorkle v. United States*, *supra*, correctly concluded that the legislative history of that statute demonstrates that the one-House veto provision was crucial to Congress' assent to the Salary Act of 1967 and therefore is not severable from the remainder of the Act. Accordingly, if former 2 U.S.C. (1970 ed.) 359(1)(B) was unconstitutional, the en-

---

<sup>14</sup> Because almost every statute contains some delegation of authority to the Executive, and could be recast in a form providing for more or less delegation, the conceptual approach suggested by the Court of Claims would place virtually no limits on Congress' power to subvert Article I's principles of bicameralism and the presidential role in the legislative process.

tire Salary Act would be invalid, and petitioners would have no claim under the Act.

Although the dissenting judges in the court below came to the contrary conclusion with respect to severability (Pet. App. D, pp. 92-105), those judges and the court in *McCorkle* are in agreement on the controlling legal principle, which, as this Court stated in *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 234, is whether the legislature would "have enacted those provisions which are within its power, independently of that which is not \* \* \*." Moreover, the dissenting judges below did not dispute the proposition stated by the court in *McCorkle* (559 F.2d at 1261), that "[w]hen the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent. See *Davis v. Wallace*, 257 U.S. 478, 484 (1922)." Accordingly, the issue here involves only the application of settled principles to the particular circumstances and legislative history of the Salary Act of 1967.

The salient feature of that legislative history, outlined at length in the opinion in *McCorkle* but largely ignored by the dissenters below, was the extreme reluctance of Congress, and particularly of the Senate, to delegate salary-making authority to the President. Thus, in response to the charges that the bill was an unwarranted delegation of power to the President, the sponsor of the bill in the House repeatedly emphasized that the one-House veto provision allowed Congress

to retain final authority with respect to federal salaries. 113 Cong. Rec. 28642-28643 (1967) (remarks of Representative Udall); 113 Cong. Rec. 28644 (1967) (remarks of Representative Holifield). The Senate Post Office and Civil Service Committee struck all of the provisions delegating authority with respect to federal salaries, explaining, "[t]he committee is unanimously opposed to any legislative proposal which would vest in the executive branch the authority to establish, affirmatively or negatively, the salaries of the Members of Congress." S. Rep. No. 801, 90th Cong., 1st Sess. 25 (1967). The Conference Committee restored these provisions, but proponents of the bill in both the House and the Senate again stressed that the one-House veto provision retained for Congress the ultimate authority over federal salaries. Thus, Senator Monroney, the Senate Floor manager, explained (113 Cong. Rec. 36108 (1967)):

If the [Senate] does not like [the salaries recommended by the President], a majority of one in either body can veto that plan and Congress can fix those salaries legislatively. We have not surrendered any power. We have the right to exercise that power whenever such a plan does not meet the consensus of a majority of one in either House.

\* \* \* \* \*

Either House, by a majority of one, can reject or modify the plan. So the power rests with the congressional branch.

See also 113 Cong. Rec. 35839 (1967) (remarks of Congressman Udall).<sup>15</sup>

Finally, the Salary Act contains no severability clause. Whether or not that fact establishes a presumption of nonseverability, it certainly negates any presumption in favor of severability and confirms, we submit, that Congress in 1967 had no intention of delegating salary-making authority to the President without the subsequent control that the provision for legislative veto gave to each House.

4. The one-House veto provision at issue here was repealed this year, and thus the issue of its validity has no prospective importance except as the principles involved are important to other similar provisions. We believe that this Court should not decide an issue of major constitutional importance in a context that would be largely advisory with respect to the particular statute involved.

<sup>15</sup> The dissenters below dismissed most of these remarks as primarily reflecting concern about delegating authority to the President to establish congressional salaries (Pet. App. D, p. 101). Whether or not that was so, the one-House veto provision made no distinction between congressional and other salaries, and there is no basis for concluding that it is non-severable, and renders the entire Act invalid, with respect to congressional salaries, but is severable with respect to all other salaries.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEITH A. JONES,  
*Acting Solicitor General.\**

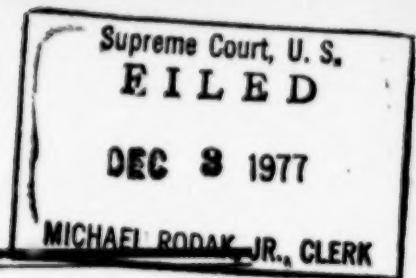
BARBARA ALLEN BABCOCK  
*Assistant Attorney General.*

LEONARD SCHAITMAN,  
ANTHONY J. STEINMEYER,  
*Attorneys.*

NOVEMBER 1977.

\* The Solicitor General is disqualified in this case.

No. 77-214



**In the  
Supreme Court of the United States**

OCTOBER TERM, 1977

---

---

C. CLYDE ATKINS, et al.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

---

---

**MOTION FOR LEAVE TO FILE REPLY TO THE  
BRIEF FOR THE UNITED STATES IN OPPOSITION  
AND PETITIONERS' REPLY BRIEF**

---

STEPHEN G. BREYER  
1545 Massachusetts Avenue  
Cambridge, Massachusetts

KEVIN M. FORDE  
111 W. Washington Street  
Chicago, Illinois 60602

*Of Counsel*

RICHARD J. PRENDERGAST  
111 W. Washington Street  
Chicago, Illinois 60602

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

**No. 77-214**

---

---

C. CLYDE ATKINS, et al.,  
*Petitioners,*  
*vs.*  
UNITED STATES OF AMERICA,  
*Respondent.*

---

---

**MOTION FOR LEAVE TO FILE REPLY TO  
THE BRIEF FOR THE UNITED STATES IN  
OPPOSITION TO THE PETITION FOR  
WRIT OF CERTIORARI**

Petitioners respectfully request leave of the Court to file a four page Reply to the Brief for the United States in Opposition to the Petition for Certiorari. A copy of the reply sought to be filed is attached to this motion.

In support of this Motion, Petitioners respectfully state that this case presents issues which the Government agrees are of the utmost constitutional import, including a challenge to a statutory scheme which the Respondent likewise agrees is unconstitutional. The Government resists Certiorari, however, contending in part that this Court's opin-

ion would be "largely advisory". The attached Reply demonstrates why a decision on the issues is essential and would not be advisory.

Respectfully submitted,

STEPHEN G. BREYER

KEVIN M. FORDE

*Attorneys for Petitioners*

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

**No. 77-214**

---

---

C. CLYDE ATKINS, et al.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

---

---

**PETITIONERS REPLY TO THE BRIEF FOR  
THE UNITED STATES IN OPPOSITION**

---

In its Brief in Opposition (hereinafter referred to as "Govt. Bf."), the Government agrees with Petitioners that the legislative veto is unconstitutional and that "a clear judicial resolution of the constitutional issue is of the utmost importance." (Govt. Br., p. 15-16). It also admits the urgency of the situation, stating (1) that the "statute at issue here and similar provisions have substantially encroached upon the constitutional functions of the President, and in many cases of the judiciary as well, in violation of the separation of powers inherent in Articles I, II, and III". (Govt. Br., p. 17), and (2) that the "decision below is the only decision to date that squarely reaches the issue." (Govt. Br., p. 16, n. 13).

The Government takes the position, however, that "notwithstanding the importance of the issue", this Court should not grant the instant Petition because, in the Government's view, the one-house veto provision under consideration is not severable from the remainder of the Postal Revenue and Federal Salary Act of 1967 and, secondly, because a recent amendment to that statute (which did no more than change the form of the legislative veto contained therein), has rendered any further decision in this cause "largely advisory".

Petitioners respectfully submit that the Government is in error in both respects. The question of the provision's severability has been addressed fully in the Petition for Writ of Certiorari (pp. 17-20) and in the Supplement thereto. As we have noted (Petition, p. 17, n. 30), none of the three Opinions comprising the Court of Claims' decision herein embraced or otherwise relied upon the view that the legislative veto, contained in a single subparagraph of the lengthy and comprehensive Postal Revenue and Federal Salary Act of 1967, could not be severed from the remainder of that Act. The Government nevertheless persists in its contention that the provision in question is neither constitutional nor severable, demonstrating an apparent willingness to accept the inevitable and devastating consequences which would accompany voiding the entire statute, *i.e.*, making every salary payment to every judge and other federal employee, paid under the Act since 1969, unlawful. (See, Petition, p. 17, n.30). It was this possibility which led the three dissenting Court of Claims' judges to characterize the argument against severability as "patently ludicrous." (The remaining members of that Court did not even address the issue.)

It should further be noted that the Government's arguments against granting the Petition implicitly contradict one another, for if the amended statute indeed has "repealed" the legislative veto contained therein, while leav-

ing the remainder of the statute in full force and effect (as the Government contends) it follows quite obviously that Congress *would* have "enacted those provisions [of the Act] which are within its power, independently of that which is not. . . ." *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932). It is respectfully submitted that the traditional criteria for determining the severability of a statutory provision are satisfied fully in this case.

**AN OPINION IN THIS CASE  
WOULD NOT BE "LARGELY ADVISORY".**

The Government has accurately stressed the growing importance of the constitutional issue presented.<sup>1</sup> Indeed, as recently as November 5, 1977, President Carter vetoed The Department of Energy Authorization Act of 1978 (S. 1811) because, *inter alia*, "[i]t limits the constitutional authority of the President through three one-House veto provisions." (See, 13 Weekly Comp. of Pres. Docs., p. 1726, and Gov't. Bf., p. 16, n. 12). Yet, having ably demonstrated the unconstitutionality of the legislative veto in general, and the urgent need for a constitutional determination on the issue, the Government then suggests that the Court should avoid resolving that issue in this case because here it "has no prospective importance", and any opinion by this Court would be "largely advisory" [Gov't. Bf., p. 20]. To support this contention, the Government argues that the one-house veto provision at issue was "repealed" earlier this year.

Petitioners respectfully submit that the alterations in statutory scheme reflected in the revised statute do not moot the issue in this case. First, Petitioners are seeking money damages based upon action by the Senate taken

<sup>1</sup> As noted in the Petition (p. 11), Congress introduced 244 such Bills in 1974 and 1975 alone.

pursuant to an admittedly unconstitutional statutory provision. For this reason alone, no change in the statutory scheme diminishes the strength or viability of Petitioners' claims. Second, and more importantly, the change in the statute (discussed in the Petition at p. 15, n. 27) has not cured the basic constitutional defect. It has only added a new twist to an admittedly unconstitutional scheme. Now, instead of requiring that one house of Congress act affirmatively (by passing a resolution) to void the lawful exercise of executive authority, either house of Congress is impowered to do so by *inaction*. If a majority of either house of the Legislative Branch declines to place its stamp of approval upon the President's decision, the lawful exercise of Executive authority is effectively "vetoed". In terms of "the basic principals of bicameralism and the presidential role in legislation" established by Article I, Sections 1 and 7 (Gov't Bf., p. 15), the crucial constitutional issue remains. Indeed the Government admits as much, identifying the veto provision in question as "one of a large number of similar provisions in federal legislation that purport to give *both* Houses, *one* House, or committees thereof, veto power over actions lawfully taken by the President pursuant to statute." (Gov't Bf., p. 13; emphasis added).

Petitioners respectfully submit that the Government's Brief In Opposition is a study in contradiction. While recognizing that "a clear resolution of the constitutional issue is of the utmost importance" (Gov't Bf., pp. 15-16), the Government seeks to avoid a resolution of the issue in this instance, notwithstanding the fact that the decision below is "the only decision to date that squarely reaches the issue". [Gov't Bf. p. 16, n. 13]. Petitioners respectfully submit that this case presents an opportunity to decide this "constitutional issue of utmost importance"; it may well be the only case providing such an opportunity.

As Senator Dirksen noted, in deploring the use of legislative vetoes:

Those provisions were unconstitutional then and they are unconstitutional now. It is true that there has been no pronouncement to that effect by the Supreme Court of the United States or by any other competent Federal court. *The reason that it is difficult to test the legality of such statutes is found in the fact that, in order for the matter to be presented to the courts, somebody must have standing to challenge its validity.* However, that fact does not make it constitutional . . . . 100 Cong. Rec. 5095 (1954). [Emphasis added.]

## CONCLUSION

In its Brief, the Government has submitted no sound reason for opposing the Writ and avoiding the ultimate resolution of this compelling constitutional question. Petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

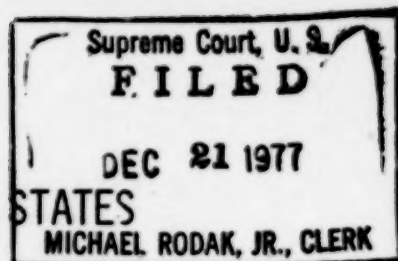
Respectfully submitted,

STEPHEN G. BREYER  
1545 Massachusetts Avenue  
Cambridge, Massachusetts  
KEVIN M. FORDE  
111 W. Washington Street  
Chicago, Illinois

Of Counsel:

RICHARD J. PRENDERGAST  
111 West Washington Street  
Chicago, Illinois 60602

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977



---

No. 77-214

---

C. CLYDE ATKINS, ET AL.,  
PLAINTIFFS

v.

UNITED STATES OF AMERICA  
DEFENDANT.

---

BRIEF OF AMICUS CURIAE ON BEHALF OF  
JACOB K. JAVITS AND EDMUND S. MUSKIE,  
UNITED STATES SENATORS, IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF CLAIMS

---

JACOB K. JAVITS  
UNITED STATES SENATOR  
U.S. SENATE  
WASHINGTON, D.C.

FOR HIMSELF AND FOR,

EDMUND S. MUSKIE  
UNITED STATES SENATOR  
U.S. SENATE  
WASHINGTON, D.C.

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

---

No. 77-214

---

C. CLYDE ATKINS, ET AL.,  
PLAINTIFFS

V.

UNITED STATES OF AMERICA  
DEFENDANT.

---

BRIEF OF AMICUS CURIAE ON BEHALF OF  
JACOB K. JAVITS AND EDMUND S. MUSKIE,  
UNITED STATES SENATORS, IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF CLAIMS

INTEREST OF AMICI CURIAE

Amici, are members of the United States Senate who are supporting the motion by petitioners in the three consolidated cases in order to seek judicial resolution of the constitutionality of the legislative veto. Amici do not express interest in other issues which may come before the Court in this case, but limit their petition to the question of the legislative veto involved and its constitutionality.

Both Senators are members of the Committee on Governmental Affairs which has in the first session of the 95th Congress been presented with several legislative proposals incorporating a legislative veto mechanism, including the Reorganization Act of 1977 and proposals to create a Department of Energy. In addition, Senator Muskie serves as Chairman of the Senate Budget Committee and is a member of the Committee on Environment and Public Works where he must consider legislative veto provisions contained in the Congressional Budget and Impoundment Control Act of 1974, as well as similar provisions in various environmental laws and proposed amendments. For example, an amendment proposed this year to the Clean Air Act and the Clean Water Act would have provided for legislative veto provisions over proposed executive branch actions but these provisions were rejected by House-Senate conference committees on which Senator Muskie served.

Senator Javits also is the ranking minority member of the Committee on Human Resources and a senior member of the Committee on Foreign Relations. As a member of those committees he has been involved with consideration of legislative veto provisions related to the Employee Retirement Income Security Act, 29 U.S.C. §1001 et. seq., and the War Powers Act, 50 U.S.C. §1541-1548 and the proposed Nuclear Nonproliferation Act of 1977.

#### REASON FOR GRANTING THE WRIT

Because of the increasing reliance by the Congress on the legislative veto mechanism as an instrument for review and oversight of Executive Branch actions, amici, as members of the United States Senate, urge this Court to resolve the constitutionality of the procedure because the issue is, in the words of the Solicitor General, "unquestionably significant ... important and recurring," -- an issue which ought to be decided in an appropriate case.

While the importance of this issue has been slow to develop, it has accelerated in this decade with an unprecedented number of laws having passed the Congress which incorporate a legislative veto mechanism.

The Congressional Research Service of the Library of Congress has advised that of the 192 bills embodying legislative vetoes enacted between 1932 and 1975, more than half were enacted since 1970. A total of 351 resolutions have been introduced between 1960 and 1975 which proposed to veto executive actions covered by the foregoing laws. Of those, 244 were introduced in 1974 or 1975.

In this first session of the 95th Congress alone, seven measures have become public law with the inclusion of a legislative veto mechanism. Another seven bills have passed the House of Representatives and two have passed the Senate which would incorporate

similar procedures (see Appendix A). Before many more laws are constructed which delegate authority to the Executive Branch agencies, and which rely on this reservation of authority in the Congress, it is important to have a definitive resolution of the constitutionality of the procedure. The importance of this issue cannot be overestimated to the evolution of the separation of powers doctrine and to the balance of powers between the branches of the Federal government. We urge the Court to supply guidance and substance to these underlying principles of the Constitution, heeding Justice Marshall's admonition that "it is a Constitution we are expounding" (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597) (1952).

The instant case presents the issue of the legislative veto squarely and directly. It is a form of its use typical of its many forms utilized by Congress. Furthermore, it is doubtful that any other case will come before the Court for some time which more clearly presents the question of the constitutionality of the legislative veto.

The Government, in its opposition brief to the petition for a writ of certiorari, states the view that the one-House veto provision of the Salary Act was unconstitutional. The Government further concludes that a "clear judicial resolution of the constitutional issue is of the utmost importance" (U.S. Brief, pp. 15-16), yet, they argue that this case does not offer the occasion for resolving this question.

Congress has been reluctant to exercise the veto authority which it has included in other public laws. In some instances, the exercise of a veto involved the proposed expenditure of appropriated funds, or the rejection of government reorganization plans submitted by the President. But in such instances, standing for judicial review often would be difficult to obtain. Other cases which have raised the issue have been more appropriately decided on other grounds, such as Buckley v. Valeo, 424 U.S. 1 (1976), or involved problems of ripeness or mootness. Clark v. Kimmit, No. 76-1105, (June 6, 1977).

Another pending case involving this issue, Chadha v. Immigration and Naturalization Service, No. 77-1702, (9th Cir), may not be decided for a lengthy period. In that case, the petitioner, an alien, was ordered deported pursuant to legislation delegating such powers to one House of Congress. While the facts of the case would seem to clearly present the issue, the average time for issuing decisions on similar cases in that circuit indicate that it could be a considerable time before it could be in a position to be considered by this Court. Furthermore, an agreement between the petitioner and the government on the merits of that case could have the effect of mootng the case, as could legislation which the Administration has proposed dealing with the rights of certain aliens.

Amici believe there is no other case which could be presented to the Court which squarely presents this issue. It is of

utmost importance to the Congress and to the Government as a whole that the issue be resolved at the earliest possible time.

#### CONCLUSION

For the reasons set out above, Amici respectfully submit that the petition for writ of certiorari should be granted in order to permit this Court to decide the very important question of the constitutionality of the legislative veto.

#### APPENDIX A

##### PUBLIC LAWS:

- 95-17 Reorganization Act of 1977
- 95-19 Emergency Unemployment Compensation Extension Act
- 95-52 Export Administration Amendments of 1977
- 95-75 International Navigational Rules Act
- 95-82 Military Construction Authorization Act
- 95-148 Foreign Assistance & Related Programs Appropriations Act
- 95-192 Soil & Water Resources Conservation Act

##### BILLS PASSED BY HOUSE:

- H.R. 10 - Federal Employees Political Activities Act, passed House, June 7, 1977
- H.R. 3199 - Federal Water Pollution Control Act Amendments, passed House, April 5, 1977
- H.R. 3816 - Federal Trade Commission Amendments, passed House, October 13, 1977, passed Senate, October 20, 1977
- H.R. 5263 - Energy Tax Bill, passed House, October 28, 1977
- H.R. 5885 - Public Rivers and Harbors Act, passed House, May 17, 1977, passed Senate, June 22, 1977
- H.R. 8410 - Labor Reform Act, passed House, October 6, 1977
- H.R. 8444 - National Energy Act, passed House, August 5, 1977

BILLS PASSED BY SENATE:

- S. 9 - Outercontinental Shelf Lands  
Act Amendments, passed Senate,  
July 15, 1977
- S. 37 - ERDA Synthetic Fuel Loan and  
Guarantee Program, passed  
Senate, March 31, 1977

APPENDIX B

KEVIN M. FORDE, LTD.

ATTORNEY AT LAW

111 WEST WASHINGTON STREET - SUITE 2025

CHICAGO, ILLINOIS 60602

PHONE 798-8015  
AREA CODE 312

November 11, 1977

Senator Edmund S. Muskie  
UNITED STATES SENATE  
Washington, D.C. 20510

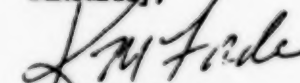
Attention: James H. Davidson  
Counsel

Re: Letter of Consent to File an Amicus  
Atkins, et al. v. United States,  
No. 77-214

Dear Senator Muskie:

On behalf of the Petitioners in the cause of Atkins, et al.  
v. United States, No. 77-214, we are authorized to advise you  
that you and Senator Jacob K. Javitz have our consent to file  
a Brief Amicus Curiae in this cause.

Sincerely,



Kevin M. Forde  
Attorney for Petitioners

KMF:ba



APPENDIX C  
Office of the Solicitor General  
Washington, D.C. 20530

November 10, 1977

Honorable Edmund S. Muskie  
United States Senate  
Washington, D. C. 20510

Re: Atkins v. United States  
No. 77-214

Dear Senator Muskie:

As requested in your letter of November 9, 1977, I  
consent to the filing in the above case of a brief amicus  
curiae by yourself and Senator Javits.

Sincerely,

*Dan M. Friedman*  
Daniel M. Friedman  
Acting Solicitor General